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Supreme Court, U.S.
FILED
07-798 DEC 12 2007
OFFICE OF THE CLERK

No. 07-____

IN THE

Supreme Court of the United States

SYED IQBAL ALI,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A panel of the United States Court of Appeals for the Seventh Circuit held that the jurisdiction-stripping provision of § 242(a)(2)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B)(ii), precludes judicial review of continuance decisions of immigration judges in removal proceedings. Section 1252(a)(2)(B)(ii) provides (with an exception for the granting of asylum that is not relevant here) that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." An immigration judge's authority to grant or deny continuances is specified only in a regulation, *see* 8 C.F.R. § 1003.29, and is not mentioned in the relevant statutory subchapter. Thus, even the Attorney General acknowledged below that the court had jurisdiction to review the continuance decision.

The question presented is:

Whether the Seventh Circuit correctly held, in direct conflict with the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits, that courts do not have jurisdiction to review a decision of an immigration judge denying a motion for a continuance.

PARTIES TO THE PROCEEDING

The parties before the court below were Syed Iqbal Ali and then-Attorney General Alberto R. Gonzales. The parties before this Court are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Syed Iqbal Ali respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Immigration Judge ("IJ") (Pet. App. 25a-29a) and the orders of the Board of Immigration Appeals ("BIA") (Pet. App. 16a-18a; 19a-25a) are unreported.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 502 F.3d 659 (Pet. App. 1a-15a).

JURISDICTION

The Seventh Circuit's opinion was issued on September 14, 2007. Pet. App. 1a-15a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The principal statutory provision involved is 8 U.S.C. § 1252; the principal regulation involved is 8 C.F.R. § 1003.29, both of which are set out in the Appendix to this petition. Pet. App. 30a-46a; 47a.

STATEMENT OF THE CASE

In several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (amended by the REAL ID Act of 2005 ("REAL ID Act"), Pub. L. No. 109-13, 119 Stat. 302), Congress amended the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537, to reduce or eliminate the jurisdiction of the courts of appeals to review

certain decisions of IJs and the BIA. Specifically, § 306(a)(2) of IIRIRA, codified at 8 U.S.C. § 1252(a)(2)(B)(ii), removed the courts' jurisdiction to review any "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of" asylum.

Before the Seventh Circuit's decision in this case, seven courts of appeals had held in published opinions (and one court of appeals in an unpublished, nonprecedential disposition) that § 1252(a)(2)(B)(ii) did not strip courts of jurisdiction to review an IJ's denial of a motion for a continuance of removal proceedings, because such a decision is not "specified under" the relevant "subchapter to be in the discretion of the Attorney General." In contrast, two courts of appeals had held that § 1252(a)(2)(B)(ii) stripped courts of jurisdiction, because an IJ's general authority to "conduct proceedings for deciding the admissibility or deportability of an alien," 8 U.S.C. § 1229a(a)(1), is within the "subchapter" covered by the provision, and a regulation implementing that subchapter, 8 C.F.R. § 1003.29, provides that an "Immigration Judge may grant a motion for continuance for good cause shown."

Importantly, in briefing before the Seventh Circuit in this case, Pet. App. 48a-56a, the First Circuit in *Alsamhouri v. Gonzales*, 484 F.3d 117, 121 (1st Cir. 2007), the Fourth Circuit in *Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007), and the Eighth Circuit in *Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007), the Attorney General interpreted § 1252(a)(2)(B)(ii) like the majority of the

courts of appeals to have addressed the issue, arguing that this jurisdiction-stripping provision does not bar review of an IJ's continuance decision. According to the Attorney General, the "Solicitor General has concurred in that position." Pet. App. 55a.

Rejecting not only the majority position, but also the view of the Attorney General, the Seventh Circuit deepened a circuit split by holding that the jurisdictional bar of § 1252(a)(2)(B)(ii) applies to continuance decisions.

A. Statutory Background

The INA allows a court of appeals considering a final order of removal pursuant to 8 U.S.C. § 1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." *Id.* § 1252(b)(9). In IIRIRA, however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of" asylum. *Id.* § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§ 1151-1381.

In the "subchapter" referred to—specifically, 8 U.S.C. § 1229a(a)(1)—Congress, among other things, vested IJs with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien." Notwithstanding this language, an IJ's express authority to grant or deny a

continuance is not found in the particular subchapter where § 1252(a)(2)(B)(ii) is contained. *See generally* 8 U.S.C. ch. 12 (entitled "Immigration and Nationality"). Instead, the authority is derived solely from regulations promulgated by the Department of Justice. *See* 8 C.F.R. § 1003.29 (stating that "[t]he Immigration Judge may grant a motion for continuance for good cause shown").

B. Immigration Proceedings Below

Syed Iqbal Ali, a citizen of Pakistan, entered the United States in 1996 on a six-month visitor's visa. Pet. App. 25a. Mr. Ali overstayed his visa, and, in March 2003, the INS charged him with removability under 8 U.S.C. § 1227(a)(1)(B), for remaining in the United States longer than authorized, and 8 U.S.C. § 1227(a)(1)(C)(i), for failing to maintain the nonimmigrant status by which he was admitted. Pet. App. 25a-26a.

At a preliminary hearing in April 2003, Mr. Ali requested and was granted a continuance so that he could seek to adjust his status to that of a lawful permanent resident under 8 U.S.C. § 1255(a). Pet. App. 26a. At Mr. Ali's next hearing in November 2003, he conceded removability but stated that he would soon become eligible for adjustment of status because his son Zeeshan had a pending application for citizenship and, once Zeeshan was naturalized, Zeeshan would file a family-based visa petition (I-130) on Mr. Ali's behalf. Pet. App. 4a; 61a.

At a subsequent hearing in February 2005, Mr. Ali again requested a continuance because Zeeshan was still in the process of naturalizing his status in the United States. Pet. App. 67a-69a. The IJ denied Mr.

Ali's request for a continuance. Pet. App. 28a. In the view of the IJ, Mr. Ali had not shown "good cause" for the continuance as required by 8 C.F.R. § 1003.29, because (1) Mr. Ali had nearly two years to work on getting a visa, (2) he was not immediately eligible for a visa, (3) his prospects for having a visa available to him were "unclear and at least possibly months to years away," and (4) he could return to Pakistan and await a visa through the consular process. Pet. App. 28a. The IJ granted Mr. Ali's request for voluntary departure. Pet. App. 28a-29a.

Mr. Ali appealed the IJ's decision to the BIA. Mr. Ali argued that the IJ's denial of a continuance was erroneous under both BIA and Seventh Circuit precedent. Pet. App. 20a-22a. The BIA rejected Mr. Ali's arguments and concluded that the IJ had given adequate reasons for denying the continuance based on the evidence. Pet. App. 21a. The BIA thus affirmed the IJ's decision and granted Mr. Ali sixty days to depart the country voluntarily. Pet. App. 23a. Mr. Ali moved for reconsideration, but the BIA denied the motion. Pet. App. 16a-18a.

Mr. Ali filed a timely petition for review in the United States Court of Appeals for the Seventh Circuit.

C. The Court of Appeals' Decision

On appeal, the Seventh Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii) deprived the court of jurisdiction to review the IJ's decision denying Mr. Ali's motion for a continuance. The court rejected the position of both Mr. Ali and the Attorney General that because continuances are not mentioned in the immigration statutes, and are only referenced in the immigration

regulations, the discretionary authority to grant or deny a continuance is not "specified under" the relevant subchapter of the INA. Pet. App. 9a. Instead, the court reasoned that, even though the INA is silent on the issue of continuances, an IJ's "*authority* to grant or deny a continuance derives not from the regulation but from the statute." *Id.* (emphasis in original). The court found an IJ's authority to grant or deny a continuance implicit in § 1229a(a)(1), which provides, in full, that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien," and § 1229a(b)(1), which provides IJs with the power to administer oaths, to receive evidence, to examine the alien and witnesses, to issue subpoenas, and to levy contempt sanctions. *Id.* The court thus concluded that "[t]he regulation pertaining to continuances implements these statutes, but the immigration judge's *authority* to conduct and control the course of removal proceedings is 'specified in' subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings, whether on the motion of a party or sua sponte. The jurisdictional bar therefore applies to continuance decisions." Pet. App. 9a-10a (emphasis in original). In so holding, the court explicitly recognized that this issue is the subject of a circuit split and "that we are aligning ourselves with the minority view." Pet. App. 10a.

In reaching this conclusion, the court also relied on its prior decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007) (holding that because an IJ's decision on cancellation of removal is unreviewable under § 1252(a)(2)(B)(i) the

choices leading to that decision, including the denial of a continuance, are likewise unreviewable). The court below reasoned by analogy that because the denial of a petition to adjust status is unreviewable under § 1252(a)(2)(B)(ii), the IJ's denial of Mr. Ali's continuance motion was unreviewable, too, because it was a "procedural step along the way to an unreviewable final decision." Pet. App. 11a-12a.

Additionally, the court held that Mr. Ali was not entitled to relief under its prior decision in *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). In *Subhan*, the court observed that § 1252(a)(2)(B)(ii) generally bars judicial review of continuance decisions. *Id.* at 595. Nevertheless, the court in that case granted a petition for review of an IJ's denial of a continuance in an adjustment of status proceeding. *See id.* The court reasoned that because, in denying the continuance, the IJ did not provide a reason consistent with the permissible reasons for denying adjustment of status under 8 U.S.C. § 1255(i), the denial of the continuance nullified the petitioner's opportunity to adjust status under § 1255(i). The court below found that *Subhan* did not apply to Mr. Ali's case because the BIA affirmed the IJ's denial of a continuance based on evidence indicating that Zeeshan's citizenship application had been denied—"a reason consistent with the adjustment [of status] statute, not merely a 'statement of the obvious.'" Pet. App. 12a.

Finally, the court refused to consider Mr. Ali's argument that the National Security Entry-Exit Registration System, which caused Mr. Ali to come to the attention of the INS, unconstitutionally targeted him for registration and removal based on

his ethnicity. Pet. App. 14a. The court reasoned that it lacked jurisdiction to hear such a claim by an alien challenging the Attorney General's decision to commence removal proceedings. Pet. App. 14a (citing 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)).

Judges Ripple, Rovner, Wood, and Williams voted to rehear the case *en banc*, but this was less than the required majority of active judges. Pet. App. 3a n.1. Mr. Ali now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons:

First, the courts of appeals are deeply split 7-3 on whether the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(ii) prohibits judicial review of an immigration judge's decision denying a motion for a continuance, with the majority and, recently, even the Attorney General, agreeing that the jurisdictional bar does not apply.

Second, this case raises an important and recurring question of immigration law, an area where, as this Court has repeatedly noted, there is a particular need for national uniformity. The precise question in this case is of exceptional national importance—whether aliens will be treated uniformly with regard to their right to judicial review of continuance decisions, or whether those aliens within the jurisdiction of three courts of appeals will be treated more harshly.

Third, the erroneous decision below is inconsistent with the text of the relevant statutory provisions and

conflicts this Court's instruction in *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), that there is a strong presumption in favor of judicial review of administrative action, particularly when it involves aliens.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT ON WHETHER COURTS HAVE JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A MOTION FOR A CONTINUANCE

This case presents this Court with a well-developed 7-3 conflict between the courts of appeals, which are now deeply split on whether courts have jurisdiction to review an IJ's denial of a motion for a continuance. In well-reasoned and thorough opinions, seven courts of appeals, the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits, have held that courts have jurisdiction to review continuance decisions. *See Alsamhouri v. Gonzales*, 484 F.3d 117 (1st Cir. 2007); *Sansui v. Gonzales*, 445 F.3d 193 (2d Cir. 2006) (per curiam); *Khan v. U.S. Attorney Gen.*, 448 F.3d 226 (3d Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439 (4th Cir. 2007); *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357 (11th Cir. 2006); *see also Martinez v. Gonzales*, 166 F. App'x 300, 300 (9th Cir. 2006) (holding the same in an unpublished, nonprecedential disposition). In contrast, the Seventh Circuit in this case, as well as the Eighth and Tenth Circuits, have held that courts do not have jurisdiction to review continuance decisions. *See* Pet. App. 10a; *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th

Cir. 2004). This 7-3 conflict is squarely presented in this case and ripe for this Court's immediate resolution. A brief review of the circuit opinions conflicting with the decision below plainly establishes the breadth and scope of this conflict.

In *Zafar*, 461 F.3d 1357, the Eleventh Circuit examined the jurisdiction-stripping provision and noted that "Congress has precisely carved-out the statutorily-provided discretionary powers of the Attorney General within [subchapter II], and, in turn, has expressly prohibited 'any court' from reviewing them." *Id.* at 1361. The court further observed that "[t]he express authority of an IJ to grant or deny a motion to continue a hearing is *not* found" in the text of subchapter II. *Id.* at 1360 (emphasis in original). Rather, "the authority of an IJ to grant a motion for continuance is derived solely from regulations." *Id.* (citing 8 C.F.R. § 1003.29). The court thus concluded that because "only the particular discretionary authorities of the Attorney General expressly 'specified' in [subchapter II] are barred from our review . . . and the discretionary authority to grant or deny a continuance in removal proceedings is not expressly contained within [subchapter II], we have jurisdiction to review those discretionary decisions." *Id.* at 1361. To support its interpretation that the discretion to grant continuances is not "specified under" subchapter II, the court noted that "[t]here are myriad Congressionally-defined discretionary *statutory* powers of the Attorney General" specifically articulated in subchapter II. *Id.* (emphasis in original). The court found it significant that the power to continue immigration proceedings is not

among them. *See id.* Finally, the court noted that its decision was in accord with this Court's instruction in *St. Cyr*, 533 U.S. at 298, that there is a strong presumption in favor of judicial review of administrative action involving aliens. *Zafar*, 461 F.3d at 1361-62.

In *Sansui*, 445 F.3d 193, the Second Circuit stated its agreement with the Eleventh Circuit's holding in *Zafar* "that the decision by an IJ or the BIA to grant or to deny a continuance . . . is not a decision 'specified under [the relevant] subchapter.'" *Id.* at 198. The Second Circuit recognized but rejected the argument that because an IJ's general authority to conduct removal proceedings is provided in 8 U.S.C. § 1229a(a)(1), a provision in subchapter II, an IJ's authority to grant or deny a continuance is "specified under" subchapter II to be in the Attorney General's discretion. *See id.* at 198-99. The court reasoned that "[a]lthough the presiding officer at a hearing traditionally has discretion to grant or to deny continuances requested by the parties appearing before him, we cannot conclude that the decision to grant or to deny a continuance in immigration proceedings is 'specified under [the relevant] subchapter to be in the discretion of the Attorney General,'" because "continuances are not even mentioned in the subchapter." *Id.* at 199 (alteration in original). The court also noted that the conferral of discretion in 8 C.F.R. § 1003.29 to grant continuances "suggests that such authority is not 'specified' under the 'subchapter' of the INA pursuant to which the regulation was promulgated." *Id.* at 199 n.8. Finally, like the Eleventh Circuit in *Zafar*, the court observed that this Court has adopted a strong

presumption in favor of judicial review of administrative action involving aliens, which compelled the exercise of jurisdiction over the petition. *See id.* at 199 (citing *St. Cyr*, 553 U.S. at 298).

The Seventh Circuit's decision also conflicts with the Fifth Circuit's decision in *Ahmed*, 447 F.3d 433. There, the court held that it had jurisdiction to review an IJ's continuance decision, relying on its prior opinion in *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005), in which the court held that § 1252(a)(2)(B)(ii) did not strip it of jurisdiction to review an IJ's discretionary denial of a motion for reconsideration. In discussing the scope of the statute, the court in *Ahmed* noted that "[o]ne might mistakenly read § 1252(a)(2)(B)(ii) as stripping us of the authority to review any discretionary immigration decision." 447 F.3d at 436 (internal quotation marks omitted). The court found that reading incorrect, however, "because § 1252(a)(2)(B)(ii) strips us only of jurisdiction to review the discretionary authority that is *specified in the statute*." *Id.* (internal quotation marks omitted; emphasis in original). The court continued: "[T]he language of § 1252(a)(2)(B)(ii) is thoroughly pellucid on this score; it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Id.* (internal quotation marks omitted; emphasis in original). The court thus held that, because an IJ's discretion to act on a motion for a continuance is derived solely from regulations

promulgated by the Department of Justice, and not from subchapter II of the INA, the jurisdictional bar of § 1252(a)(2)(B)(ii) did not apply. *Id.* at 436-37; *see also Zhao*, 404 F.3d at 303 (concluding that construing § 1252(a)(2)(B)(ii) to apply to the grant of discretion in a regulation "would belie Congress's conspicuous selection of the phrase 'specified under this subchapter'").

The Third Circuit's decision in *Khan*, 448 F.3d 226 reached the same result, quoting at length from the Fifth Circuit's opinions in *Ahmed* and *Zhao*, the Second Circuit's opinion in *Sansui*, and the Eleventh Circuit's opinion in *Zafar*, and held that the court had jurisdiction to review the denial of a continuance motion. *See id.* at 231-32. Similarly, the Fourth Circuit's opinion in *Lendo*, 493 F.3d 439, "agree[d] with the majority of circuits that have considered the issue that § 1252(a)(2)(B)(ii) does not bar judicial review of an IJ's denial of a motion to continue removal proceedings." *Id.* at 441 n.1.

In the First Circuit case of *Alsamhouri*, 484 F.3d 117, the Attorney General argued that § 1252(a)(2)(B)(ii) did *not* bar judicial review of an IJ's decision to grant or deny a continuance, just as he did before the Seventh Circuit in this case. Unlike the Seventh Circuit, the court in *Alsamhouri* accepted the Attorney General's interpretation of § 1252(a)(2)(B)(ii) and held that it had jurisdiction. *See id.* at 121-22. The court observed that subchapter II does not even mention continuances, let alone specify that the granting or denial of continuances by an IJ is "in the discretion of the Attorney General." *Id.* at 122 (internal quotation marks omitted). The court reasoned that the plain

language of § 1252(a)(2)(B)(ii) does not limit jurisdiction when an IJ exercises discretion "not specified anywhere in the statutory subchapter, but rather derives entirely from regulations promulgated by the Attorney General." *Id.*

In *Abu-Khaliel*, 436 F.3d 627, the Sixth Circuit concluded that § 1252(a)(2)(B)(ii) did not strip it of jurisdiction to review an IJ's denial of a continuance, but it reached that conclusion through different reasoning than that used in the opinions discussed above. Disagreeing with the reasoning of the Eleventh Circuit in *Zafar*, the court stated that the authority of IJs to grant continuances is "specified under" § 1229a(a)(1), the section of subchapter II that generally empowers IJs to conduct removal proceedings. *Abu-Khaliel*, 436 F.3d at 634. It concluded, however, that § 1252(a)(2)(B)(ii) only withdrew courts' jurisdiction to review discretionary decisions of the *Attorney General*, not those of IJ's. *Id.* The court thus held that the jurisdictional bar did not apply to an IJ's discretionary decision to deny a continuance. *Id.*[1]

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[1] In addition to these decisions, the Ninth Circuit has held in an unpublished, nonprecedential disposition that it has jurisdiction to review the continuance decisions of IJs. *See Martinez*, 166 F. App'x at 300. Moreover, as the Attorney General noted in its supplemental briefing before the Seventh Circuit, Pet. App. 53a n.4, the Ninth Circuit, in *Medina-Morales v. Ashcroft*, determined that it had jurisdiction to review a discretionary denial of a motion to reopen, holding that § 1252(a)(2)(B)(ii) "applies only to acts over which a *statute* gives the Attorney General pure discretion unguided by legal standards or statutory guidelines." 371 F.3d 520, 528 (9th Cir. 2004)

The Seventh Circuit's decision is, however, consistent with the Eighth Circuit's opinion in *Onyinkwa*, 376 F.3d 797, in which the court held that it did not have jurisdiction to review an IJ's denial of a motion for continuance. The court stated broadly that "[w]henever a regulation implementing a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion." *Id.* at 799. The court noted that 8 U.S.C. § 1229a(a)(1) authorizes IJs to conduct removal proceedings and that 8 C.F.R. § 1003.29 "has long been held to confer discretion upon an IJ to grant or deny a continuance." *Id.* The court thus concluded that because 8 C.F.R. § 1003.29, a regulation implementing subchapter II, vests IJs with discretion to decide continuance motions, under § 1252(a)(2)(B)(ii), it had no jurisdiction to review exercises of that discretion. *Id.*[2]

Similarly, the Tenth Circuit in *Yerkovich*, 381 F.3d 990, held that it had no authority to review a denial of a continuance. The court observed that although subchapter II does not specifically confer discretion on IJs to grant or deny continuances, 8 C.F.R.

(emphasis added). This holding forecloses any argument that § 1252(a)(2)(B)(ii) bars review of a denial of a continuance in the Ninth Circuit.

[2] A subsequent panel of the Eighth Circuit stated its disagreement with *Onyinkwa* and urged that "it may be appropriate for our court to revisit this issue *en banc*." *Ikenokwalu-White*, 495 F.3d at 924 n.2. However, the court has not taken any steps toward reconsidering the issue. *See id.* (noting "the present case is [not] the most appropriate vehicle for" *en banc* rehearing).

§ 1003.29 does. *Yerkovich*, 381 F.3d at 993. The court also relied on what it viewed to be the "theme" of IIRIRA—to protect executive discretion from judicial review. *Id.*

In light of these cases, the conflict on this question is well-developed: Courts of appeals on both sides of the issue have examined the relevant statutory provision, and have engaged a variety of interpretive tools to ascertain the correct rule. They have also scrutinized and responded to the reasoning of the courts and judges on the other side of the split. As academic commentary has noted, the Court should therefore review the split now because nothing would be gained from further percolation in the lower courts. *See* Tarik Naber, Comment, *Judicial Review Under 8 U.S.C. § 1252(a)(2)(B)(ii): How a Minority of Federal Circuit Courts are Keeping Non-Citizens Out of Court*, 40 U.C. DAVIS L. REV. 1515, 1541-42 (2007) ("The issue is appropriate for Supreme Court review because seven circuits [now ten] have addressed the issue and remain almost evenly divided. Also, the courts of appeals have all decided their cases within the past three years . . . . This means that the split is very much active and ripe for review." (footnote omitted)).

Finally, further percolation would be particularly unwarranted here because the Attorney General and Solicitor General now concede that the jurisdictional bar does *not* apply to continuance decisions.[3] There

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[3] *See* Pet. App. 8a (noting "that the Department of Justice now takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions");

will therefore be no adversarial disagreement in front of any court to aid in developing whatever new insights or variations on this issue could possibly be developed at this juncture. Review now would also terminate the extraordinarily anomalous situation in which the Attorney General concedes that his decisions are reviewable under a statute he enforces but courts, without the benefit of adversarial briefing, eschew the proffered invitation to review. Certainly further "percolation" in this unusual situation can neither ameliorate the split nor aid this Court in resolving the question presented. Thus, the time to act is now.

II. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE, AFFECTING THE UNIFORM ADMINISTRATION OF THE NATION'S IMMIGRATION LAWS AND AFFECTING A SUBSTANTIAL NUMBER OF CASES

The question presented involves an issue of great national importance and affects a substantial number

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Ikenokwalu-White, 495 F.3d at 924 n.2 (noting that "the Attorney General in the present case sent our court a letter withdrawing arguments against jurisdiction . . . and conceding this issue"); *Lendo*, 493 F.3d at 441 n.1 (noting that the government withdrew the argument that the court was barred by § 1252(a)(2)(B)(ii) from reviewing a continuance decision); *Alsamhouri*, 484 F.3d at 121 (noting that the government conceded "that section 1252(a)(2)(B)(ii) poses no jurisdictional bar to judicial review of a decision by an IJ, pursuant to 8 C.F.R. § 1003.29, to grant or deny a continuance" (footnote omitted)). And, as noted, the "Solicitor General has concurred in that position." Pet. App. 55a.

of immigration cases. The fact that eleven courts of appeals have addressed this question within four years of the first decision establishes the question's present-day importance and recurrence. Indeed, the question continues to arise frequently in the courts of appeals.[4] Accordingly, this Court's intervention is now necessary to resolve the split and to ensure that the immigration laws are uniformly administered throughout the United States.

A. Uniformity Is Imperative In Administering The Immigration Laws

This Court has made clear that the immigration laws governing access into the country as a whole should be uniformly interpreted and administered because of "the Nation's need to speak with one voice in immigration matters." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks

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[4] *See, e.g.*, *Ilic-Lee v. Mukasey*, ___ F.3d ___, 2007 WL 4063893, at *1 (6th Cir. Nov. 19, 2007) (following *Abu-Khaliel*); *Tariq v. Keisler*, 505 F.3d 650, 658 (7th Cir. 2007) (following *Ali*); *Feliz v. Gonzales*, 487 F.3d 71, 72 (1st Cir. 2007) (following *Alsamhouri*); *Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) (following *Sansui*); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007) (following *Abu-Khaleil*); *Ikenokwalu-White*, 495 F.3d at 924 n.2 (suggesting that the Eighth Circuit should reconsider *en banc* the holding of *Onyinkwa*); *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005) (holding that the REAL ID Act did not abrogate *Onyinkwa*), *cert. denied*, 547 U.S. 1079 (2006); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam) (following *Onyinkwa*); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007) (following *Yerkovich*); *Haswanee v. U.S. Attorney Gen.*, 471 F.3d 1212, 1214 (11th Cir. 2006) (per curiam) (following *Zafar*).

omitted). This Court's "one voice" requirement recognizes that immigration policy affects our relations with other nations and thus it must, like other aspects of foreign policy, be exercised uniformly by the federal government. *Compare Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) (noting "the concern for *uniformity* in this nation's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place" (emphasis added; internal quotation marks omitted)), *with* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have the power . . . to establish an *uniform* Rule of Naturalization." (emphasis added)). As such, the federal courts of appeals have recognized that avoiding circuit splits is particularly critical in this area of the law given that "[n]ational uniformity in the immigration and naturalization laws is paramount." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994); *see also id.* (noting that "rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen"); *Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (en banc) (avoiding a circuit split on an immigration issue and noting that "[n]ot only does our conclusion today help heal an intercircuit split, it also will help achieve nationwide uniformity in an area of the law where uniformity is particularly important").

Uniformity is especially important here given that this circuit split potentially affects a significant percentage of all cases before the courts of appeals. Over the past several years, "the U.S. Courts of Appeals have seen a dramatic increase in

immigration cases. . . . [T]he courts of appeals are receiving about five times as many petitions for review today as they did before 2002." John R.B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005). Examining a longer period of time, another study concluded that, in the ten-year period between 1997 and 2006, there was a 970% increase in the number of cases seeking judicial review of immigration orders. Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y. L. SCH. L. REV. 37, 39 (2007).[5]

Moreover, immigration cases are also increasing in *relative* terms; they comprise a growing proportion of the dockets of federal appellate courts. In 2001, immigration appeals accounted for only 3 percent of

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[5] Data made available by the Administrative Office of the United States Courts confirms these scholars' observations. In 2001, 1760 petitions for review of immigration decisions were filed with the federal courts of appeal. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 98 (2001) (hereinafter *Judicial Business 2001*), *available at* http://www.uscourts.gov/judbus2001/appendices/b03sep01.pdf (last visited Dec. 11, 2007). By 2006, that number had increased nearly seven-fold to 11,911. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 115 (2006) (hereinafter *Judicial Business 2006*), *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (last visited Dec. 11, 2007).

the caseload of the federal courts of appeals.[6] In 2006, of the 66,618 cases filed in the federal courts of appeals, 11,911 were petitions for review of BIA decisions, which made these cases almost 20 percent of the entire caseload of the federal courts of appeals.[7]

Academic commentary has attributed this dramatic increase in part to jurisdictional disputes fostered by jurisdiction-stripping provisions like 8 U.S.C. § 1252(a)(2)(B)(ii). *See* Benson, *supra*, at 42 (noting that, after IIRIRA, courts have "had to spend time exercising jurisdiction in order to determine whether they had jurisdiction"). This case presents this Court with an opportunity to provide clear guidance to the courts of appeals regarding the scope of their jurisdiction.

B. The Jurisdictional Question Presented Is Outcome-Determinative In Immigration Proceedings

A judicial refusal to review a continuance decision has a profound impact on an alien's substantive rights because in the immigration context, unlike most situations, improper denial of a continuance does not merely affect when adjudication will occur, but will usually have an outcome-determinative effect on whether an alien is removed from the country.

Aliens often seek continuances to gain the time needed for the government to make a determination about the alien or his family that will greatly affect

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[6] *See Judicial Business 2001*, at 98.

[7] *See Judicial Business 2006*, at 115.

his status—such as acting on a labor certification petition or a relative's visa application. *See, e.g.*, *Zafar*, 461 F.3d at 1359 (alien sought a continuance because he had a pending labor certification request); *Khan*, 448 F.3d at 229 (same); *Ahmed*, 447 F.3d at 435 (same); *Subhan*, 383 F.3d at 593 (same); *Yerkovich*, 381 F.3d at 992 (alien sought a continuance because her daughter recently passed the naturalization examination and her daughter's citizenship would entitle the alien to obtain lawful permanent resident status); *Onyinkwa*, 376 F.3d at 798 (alien sought a continuance while his wife filed a visa application on his behalf); *Abu-Khaliel*, 436 F.3d at 629-30 (same); *see also Sansui*, 445 F.3d at 195 (alien sought a continuance to acquire medical evidence in support of his claim under the Convention Against Torture). But as even the Seventh Circuit has recognized, "the wheels of bureaucracy grind slow," and often, the alien remains waiting, through no fault of his or her own, for the request to be processed. *See Subhan*, 383 F.3d at 593. If the IJ refuses the continuance that the alien needs to adjust status, this effectively denies the statutory right to challenge removal and can result in the removal of an alien who would have been allowed to stay once his government paperwork was processed. Thus, "[a]n IJ's decision to deny a continuance . . . can prove decisive in an alien's case," and result in an alien's removal "solely because of bureaucratic delay." Naber, *supra*, 40 U.C. DAVIS L. REV. at 1539-40.

In addition to bureaucratic inertia, obvious practical problems created by dealing with foreign languages and governments often cause delay in

establishing the alien's entitlement to stay. For example, in *Badwan v. Gonzales*, 494 F.3d 566, 567 (6th Cir. 2007), the alien sought a continuance to obtain a translation of a foreign-language document establishing his divorce from his first wife—a translation Badwan unquestionably needed to establish his eligibility for adjustment of status. *Id.* at 567-68. The IJ denied the continuance and, because Badwan did not have the evidence he needed to prove his eligibility for adjustment of status at that time, denied Badwan's adjustment application and ordered him to depart the country. *Id.* at 569. The Sixth Circuit reversed, observing that, except for lacking the required translation, Badwan would have had "little trouble" establishing his eligibility for adjustment of status, and noted that Badwan had, in fact, obtained the required translation by the time he appealed to the BIA. *Id.*

In short, without judicial review of continuance denials, an IJ can deny continuance requests with impunity and arbitrarily deny aliens any realistic opportunity to secure the documents establishing that they satisfy the relevant criteria.

Furthermore, the disuniform access that individual litigants have to judicial review is very significant. That aliens in some circuits receive judicial review of continuance decisions, while aliens in other circuits do not, is antithetical to the overriding goal of having courts speak with "one voice" on immigration laws. *See Zadvydas*, 533 U.S. at 700. This Court's review is necessary to establish uniformity in immigration laws throughout the United States and to ensure that immigrants in the Seventh, Eighth, and Tenth

Circuits enjoy the same rights as immigrants in the rest of the country.

Finally, there are no concerns about this case as a vehicle for resolving the split. As noted, the Seventh Circuit below squarely and unequivocally held that the "jurisdictional bar . . . applies to continuance decisions," thus "aligning [them]selves with the minority view," both because it disagreed with the majority's interpretation of the statute as an original matter and because the "majority position . . . cannot be reconciled with [the Seventh Circuit's] recent opinion in *Leguizamo-Medina*." Pet. App. 10a.[8]

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[8] In the Seventh Circuit's prior opinion in *Subhan*, the court "sidestepped . . . the question" of whether § 1252(a)(2)(B)(ii) precluded jurisdiction because it found that the denial of a continuance violated *§ 1255(i)*. Pet. App. 7a; *see Subhan*, 383 F.3d at 595 (holding that the IJ "violated § 1255(i) when he denied Subhan a continuance without giving a reason consistent with the statute"). But *Subhan*'s creation of an exception to the ban on reviewing continuance decisions under *§ 1255(i)* (which applies only to a narrow class of aliens) does not affect the bar against reviewing such decisions under § 1252(a)(2)(B)(ii). Indeed, *Leguizamo-Medina forecloses* use of the "*Subhan* exception," *i.e.*, allowing review of a continuance denial on the grounds that the denial affected the alien's potential adjustment of status. *Cf. Subhan*, 383 F.3d at 595 (permitting judicial review of continuance denials that nullify the opportunity to adjust status). Rather, under the reasoning of *Leguizamo-Medina* (which the decision below erroneously applied here, *see infra* at pp. 29-30), a continuance decision *cannot* be reviewed if it affects adjustment of status precisely because that adjustment of status decision is itself unreviewable and, consequently, there purportedly can be no judicial review of the "'propriety of the steps that led to that decision.'" Pet. App. 11a (quoting *Leguizamo-Medina*, 493 F.3d at 775).

III. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE RELEVANT STATUTE AND IS OTHERWISE ERRONEOUS

Under basic principles of statutory construction, the interpretation of the majority of the federal appellate courts is correct and that of the decision below is erroneous.

First, the relevant statutory language makes plain that subchapter II itself must specifically provide the Attorney General with discretionary authority in order for § 1252(a)(2)(B)(ii) to bar judicial review: "[N]o court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). On its face, § 1252(a)(2)(B)(ii) precludes judicial review only if "the authority" for the "decision or action" at issue is "specified under this subchapter," subchapter II, "to be in the discretion of the Attorney General." Subchapter II specifies neither that the Attorney General has authority to grant a continuance nor that the decision to grant or deny a continuance is in the Attorney General's discretion. Instead, the discretionary authority to grant or deny a continuance is vested in IJs by a regulation promulgated by the Department of Justice, 8 C.F.R. § 1003.29. Thus, under its plain language, § 1252(a)(2)(B)(ii) does not reach discretionary authority that derives from immigration regulations, but is not specified in Subchapter II.

The Seventh Circuit reached a contrary result by asserting that an IJ's authority to grant or deny a continuance does not derive from 8 C.F.R. § 1003.29, but from subchapter II, specifically 8 U.S.C. § 1229a(a)(1) and (b)(1). The Seventh Circuit reasoned that these two provisions "specify" an IJ's general authority to conduct removal proceedings "and this necessarily encompasses the discretion to continue the proceedings." Pet. App. 9a.

While an IJ's general power to conduct proceedings might well *imply* a power to continue proceedings, the jurisdictional bar applies only to authority "*specified*" in subchapter II, not those powers which can be inferred from a general grant. There is a clear distinction between discretionary authority that lies in IJs by default and the authority that subchapter II explicitly specifies to be in the Attorney General's discretion. As the Ninth Circuit has observed in a similar context, "[b]ecause 8 U.S.C. § 1229a(c) [permitting aliens to file motions to reopen] neither grants nor limits the Attorney General's discretion to deny motions to reopen, IIRIRA can perhaps be said to have left such authority to the Attorney General by default. But default authority does not constitute the *specification* required by § 1252(a)(2)(B)(ii)." *Medina-Morales*, 371 F.3d at 528 (emphasis in original).

Second, the Seventh Circuit's interpretation renders superfluous the word "specified" in § 1252(a)(2)(B)(ii). Because that interpretation invokes the jurisdictional bar for all relevant authority "*derive[d]*" from Subchapter II, the decision below would have reached the same result if the word "specified" was excised from the statute (or changed to "derived" or "stemming from"). This runs afoul of

the bedrock principle that "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (holding that a provision of the INA limiting judicial review of certain adjustment of status decisions did not bar a federal court action, noting that "had Congress intended the limited review provisions . . . to encompass challenges to INS procedures and practices, it could easily have used broader statutory language").

Third, in many provisions of subchapter II, Congress explicitly vested the Attorney General with discretionary authority over certain decisions or actions. *See, e.g.*, 8 U.S.C. §§ 1154(a)(1)(J), 1157(c)(1), 1158(b)(2)(A)(v), 1159(b), 1182-83, 1184(q)(3), 1186b(d)(3), 1203(b), 1225(a)(4), 1225(b)(1)(A)(iii)(I), 1226a(a)(7), 1227(a)(1)(E)(iii), 1227(a)(1)(H), 1229a(c)(7)(C)(iv)(III), 1229b(b)(2)(D), 1229c(a)(2)(B), 1254a(b)(3)(C), 1255(a), 1255(j)(2), 1255a(b)(1)(D)(ii), 1255a(c)(5)(C), 1255a(g)(2)(C), 1255b(b), 1259, 1281(a), 1281(c), 1285, 1286, 1302(c), 1305(b), 1321(a), 1330(a), 1365a(f)(2), 1367(b). That Congress has explicitly specified in subchapter II so many decisions or actions to be in the Attorney General's discretion demonstrates that Congress knows how to place a decision within § 1252(a)(2)(B)(ii)'s insulation from judicial review. Congress' decision not to mention continuances in subchapter II is, therefore, a clear indication that it never intended continuance decisions made under the authority of an immigration regulation to be shielded from judicial review.

Fourth, even if the Seventh Circuit's reading of § 1252(a)(2)(B)(ii) is *plausible*, it is certainly not sufficiently compelling to overcome the "strong presumption in favor of judicial review of administrative action," especially in cases involving aliens. *St. Cyr*, 533 U.S. at 298. "From the beginning," this Court wrote in *Bowen v. Michigan Academy of Family Physicians*, "'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" 476 U.S. 667, 670 (1986) (alteration in original) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). In addition, this Court has frequently construed jurisdiction-stripping statutes, like § 1252(a)(2)(B)(ii), narrowly. *See, e.g.*, *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 486 (adopting a "narrow reading" of 8 U.S.C. § 1252(g), another jurisdiction-stripping provision of IIRIRA).

Furthermore, even with respect to statutory provisions that do not strip jurisdiction, ambiguities in immigration statutes must be resolved "in favor of [an alien] because deportation is a drastic measure and at times the equivalent of banishment or exile." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citation omitted); *see also St. Cyr*, 533 U.S. at 320 (noting that it is a "'longstanding principle of statutory construction [that] any lingering ambiguities in deportation statutes [should be construed] in favor of the alien." (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))).

In this case, the narrowest and most favorable reading of the statutory language is to permit aliens to seek judicial review of continuance decisions.

Fifth, the contrary justifications of the Seventh Circuit below and the Eighth and Tenth Circuits are unpersuasive. In declining to exercise jurisdiction over Mr. Ali's petition for review, the Seventh Circuit below relied in part on its holding in *Leguizamo-Medina* that "[w]hen a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion." Pet. App. 11a (internal quotation marks omitted). The court reasoned that because it would not have had jurisdiction to review a denial of adjustment of status, it had no jurisdiction to review the continuance decision under *Leguizamo-Medina*. Pet. App. 11a-12a. Thus, the Seventh Circuit, under the reasoning adopted below, would not review the denial of a continuance—even if § 1252(a)(2)(B)(ii) did not exist—because the continuance denial would purportedly be a procedural step on the way to an unreviewable adjustment of status determination.

However, the order under review here, as in all continuance-denial challenges, is the final order of *removal*, which is plainly reviewable under 8 U.S.C. § 1252(a)(1). As the decision below itself acknowledged, "we are not reviewing a final decision denying adjustment of status (the case never got that far)." Pet. App. 11a. Rather, the final agency action being challenged is the reviewable order of removal, on the grounds that a properly conducted hearing would have afforded the alien time to alter his status in a way that may defeat removal. Thus, the alien is

challenging "a step to" a *reviewable* decision, not any unreviewable refusal to adjust status.

Moreover, the Eighth Circuit's conclusion that jurisdiction is barred "[w]henever a *regulation* implementing a subchapter II statute confers discretion upon an IJ," *Onyinkwa*, 376 F.3d at 799 (emphasis added), cannot be reconciled with the plain language of § 1252(a)(2)(B)(ii) which, as noted, divests the courts of jurisdiction only when discretionary authority "is specified under" subchapter II.

The Tenth Circuit similarly renders the "specified under" limitation meaningless and, indeed, directly excises it from the statute. In *Van Dinh v. Reno*, the Tenth Circuit stated that "'§ 1252(a)(2)(B)(ii) provides that no court has jurisdiction to review *any* decision or action the Attorney General has discretion to make 'under this subchapter,'" except for asylum decisions. 197 F.3d 427, 433 (10th Cir. 1999) (quoted in *Yerkovich*, 381 F.3d at 993). As the Fifth Circuit rightly noted in *Zhao*, however, this paraphrase "misstat[es] the statutory text, omitting the phrase 'the authority for which is specified' before 'under this subchapter.'" 404 F.3d at 303 n.6. "By selectively (or inadvertently) omitting this language, the *Yerkovich* and *Van Dinh* courts analyze statutory language that Congress did not adopt." *Id.* Also, in *Yerkovich*, the Tenth Circuit refused to exercise jurisdiction based on what it viewed as the "theme" of IIRIRA—protecting Executive discretion from judicial review. 381 F.3d at 994. But statutory "themes" (whatever they may be) cannot trump plain statutory language. *See FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 305 (2003).

In sum, this Court's immediate intervention is necessary to restore national uniformity to the administration of the immigration laws and this case is an ideal vehicle for doing so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 12, 2007

APPENDIX

Nos. 06-3240 & 06-3879

IN THE

United States Court of Appeals for the Seventh Circuit

SYED IQBAL ALI,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

Petitions for Review of Orders of the Board of Immigration Appeals. No. A95-925-079

ARGUED FEBRUARY 22, 2007, DECIDED SEPTEMBER 14, 2007

Before BAUER, EVANS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Syed Ali petitions for review of decisions of the Board of Immigration Appeals ("BIA") affirming an immigration judge's ("IJ") denial of his request for a continuance and denying his subsequent motion for reconsideration. Ali sought to continue his removal hearing to await a disposition on his son Zeeshan's application for American citizenship; once

naturalized, Zeeshan could sponsor Ali's petition to adjust his status to that of a lawful permanent resident. Ali now argues, as he did before the BIA, that the IJ failed to provide an adequate reason for denying the continuance. He also contends that the National Security Entry-Exit Registration System ("NSEERS") program, through which his illegal presence in the United States was brought to the attention of the immigration authorities in the first place, unconstitutionally targets aliens from Arab and Muslim countries.

This circuit has previously assumed, without deciding, that the jurisdiction-stripping provision of § 242(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(a)(2)(B)(ii), generally precludes judicial review of continuance decisions of immigration judges. *Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004). The Attorney General now argues, in a change of position, that § 1252(a)(2)(B)(ii) does not apply to denials of continuances. We note the concession but disagree.

Section 1252(a)(2)(B)(ii) provides (with an exception not relevant here) that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the *authority* for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The Attorney General's current view is that this provision is inapplicable to continuance decisions because an immigration judge's authority to grant continuances is conferred by regulation, not statute. While it is true that continuances are specifically mentioned only in the administrative regulations, *see* 8 C.F.R. § 1003.29, an

immigration judge's *authority* to grant or deny a continuance is statutory; it derives from 8 U.S.C. § 1229a, which confers upon immigration judges the plenary authority to conduct removal proceedings. The regulation regarding continuances simply implements the immigration judge's statutory authority to control the course of removal proceedings.

Accordingly, as suggested but not decided in *Subhan*, an immigration judge's denial of a continuance motion is a discretionary "decision or action" the "authority for which" is committed to the immigration judge by the relevant subchapter of the INA, and the jurisdictional bar in § 1252(a)(2)(B)(ii) generally precludes judicial review. Although this is the minority position among the circuits that have considered the question, we think it the sound one and now adopt it.[1] This position is consistent with our recent decision in *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007), which interpreted the preceding subsection of the jurisdiction-stripping statute, § 1252(a)(2)(B)(i). *Leguizamo-Medina* held that where § 1252(a)(2)(B)(i) removes jurisdiction to review a final immigration decision (the statute eliminates judicial review of

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). A majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges. Judges Ripple, Rovner, Wood, and Williams voted to rehear this case *en banc*.

agency decisions regarding certain forms of immigration relief), review of continuance denials and other interim orders leading up to the final decision is also precluded.

Here, Ali conceded removability but sought a continuance so he could pursue adjustment of status if his son's application for citizenship was approved. He now seeks review of the denial of the continuance, but our review is barred by both § 1252(a)(2)(B)(ii) and the logic of *Leguizamo-Medina*. Adjustment of status determinations are unreviewable under § 1252(a)(2)(B)(i); the IJ's continuance decision is interim to Ali's contemplated adjustment of status application, and interim orders entered along the road to an unreviewable final order are themselves unreviewable.

We also hold that Ali's case does not fall within the exception to the jurisdictional bar recognized in *Subhan*. Finally, we lack jurisdiction to consider Ali's constitutional challenge to the NSEERS program.

I. BACKGROUND

Ali, a citizen of Pakistan, entered the United States in 1996 on a six-month visitor's visa. He overstayed his visa and in 2003 was placed in removal proceedings. After a preliminary hearing in April 2003, his case was continued, and at the next hearing in November, Ali conceded removability. Through counsel, he told the IJ that his son Zeeshan had a pending application for citizenship and that once he was naturalized, Zeeshan intended to file a family-based visa petition (I-130) on Ali's behalf. Ali also informed the IJ that although he missed the one-year deadline for seeking asylum, he intended to

apply for withholding of removal and relief under the Convention Against Torture. (He apparently never did apply for these forms of relief.) The IJ continued the hearing twice more, until February 2005.

Meanwhile, Zeeshan—who had not yet been granted citizenship—filed an I-130 petition on Ali's behalf. Zeeshan, a permanent resident, represented that he was sponsoring Ali as a "parent of U.S. citizen." Ali moved to have his removal case continued again, or administratively closed, to await a decision on Zeeshan's citizenship application. The government opposed the motion.

At the February 2005 hearing, Ali argued that his son's naturalization application was still pending and that it would be unjust to "tear a father from his son" if Ali could adjust his status once Zeeshan became a citizen. To support his request for a continuance, Ali offered into evidence a "walk-in form" that Zeeshan had submitted to the office of United States Senator Richard Durbin requesting intervention in his citizenship application. On that form Zeeshan stated his interview and citizenship test had been held in January 2004, and his application for citizenship had been denied on the ground of "poor moral character."

Without mentioning this form—evidence submitted by Ali establishing that Zeeshan's naturalization application had already been *denied*—the IJ concluded that Ali had not established the requisite "good cause" for a continuance. 8 C.F.R. § 1003.29. The IJ explained that Ali was not immediately eligible for a visa, that a long continuance had already been granted based on Ali's representation that his son's application would be decided soon, and that "everyone who appears before me has family ties

in the United States." The IJ denied the continuance and granted relief in the form of voluntary departure.

Ali appealed the IJ's decision to the BIA, arguing that the denial of a continuance was erroneous under *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002), and *Subhan*, 383 F.3d at 593-94. In *Velarde-Pacheco*, the BIA determined that a properly filed motion to reopen for adjustment of status based on a marriage-based visa petition may be granted in the exercise of discretion as long as certain criteria are met. 23 I. & N. Dec. at 256. In *Subhan*, this court held that an IJ had erred by arbitrarily denying a continuance to an alien seeking to adjust his status based on an employment certification, the application for which was awaiting action by the state and federal labor departments. 383 F.3d at 595. The BIA rejected Ali's argument that his case was analogous to either *Subhan* or *Velarde-Pacheco* and concluded that the IJ had given adequate reasons for denying the continuance. In addition, the BIA held that the continuance was properly denied based on the evidence Ali submitted indicating that Zeeshan's citizenship application had already been denied due to poor moral character.

Ali moved for reconsideration. The BIA denied the motion because Ali merely reiterated the arguments he made on appeal rather than citing any legal or

factual omission or defect in the BIA's decision.[2] Ali now petitions for review.

II. DISCUSSION

Ali contends the IJ improperly denied a continuance simply because no visa was immediately available for him, a flaw in reasoning that led to our granting the petition for review in *Subhan*, which he argues is indistinguishable from his case. He also faults the BIA for relying on the apparent denial of his son's citizenship application, which he asserts is still pending and which was not (he now claims) the only basis for adjusting his status. Ali asserts that Zeeshan's permanent resident status provides an alternate ground to adjust status. Finally, Ali challenges the constitutionality of the NSEERS program that brought him to the attention of the Department of Homeland Security ("DHS") and led to the commencement of removal proceedings against him.

Before reaching the merits of Ali's arguments, we must first consider our jurisdiction to review a denial of a continuance in a removal proceeding. In *Subhan*, we assumed jurisdiction to review continuance decisions was lacking by virtue of the jurisdiction-stripping provision of § 1252(a)(2)(B)(ii). But we sidestepped an ultimate decision on the question, reasoning that if the denial of a continuance

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[2] Although we are dismissing the petitions for review for lack of jurisdiction, we note that the BIA's reason for denying reconsideration is consistent with *Rehman v. Gonzales*, 441 F.3d 506, 508 (7th Cir. 2006).

effectively nullified the statutory opportunity to adjust status, *see* 8 U.S.C. § 1255, the IJ must provide a reason for the denial consistent with § 1255, not just a statement of the procedural posture of the case. 383 F.3d at 593-94. The IJ in *Subhan* had denied a continuance simply because the alien's labor certification had not yet been processed, which we viewed as "merely a statement of the obvious," not a *reason*. *Id.* at 593.

While the Attorney General has argued in other cases that we lack jurisdiction to review continuance denials (and also has sought to distinguish or limit *Subhan*), in this case and others more recently, he "declined to assert" the jurisdictional bar. We have noted the impropriety of this position; "jurisdiction always comes ahead of the merits." *Leguizamo-Medina*, 493 F.3d at 774. When questioned about jurisdiction at oral argument, the agency's attorney informed us that the Department of Justice now takes the position that the jurisdiction-stripping provision, § 1252(a)(2)(B)(ii), does not apply to continuance decisions. We asked for supplemental briefing on the matter. We have carefully considered the Department's changed position and find ourselves unable to agree with it.

The jurisdiction-stripping provision at issue here precludes judicial review of immigration decisions "the *authority* for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). By its terms, this statute removes jurisdiction to review only those decisions the authority for which is committed to the discretion of the Attorney General by 8 U.S.C. § § 1151-1381 (the

statutes comprising subchapter II of Chapter 12 of the INA). The Attorney General now argues that because continuances are referenced only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is not "specified under this subchapter" within the meaning of § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply.

It is true that the relevant subchapter of the INA is silent on the subject of continuances. As we noted in *Subhan*, 383 F.3d at 595, continuances are mentioned in the implementing administrative regulations, at 8 C.F.R. § § 1003.29; this regulation provides that an immigration judge "may grant a motion for continuance for good cause shown." But an immigration judge's *authority* to grant or deny a continuance derives not from the regulation but from a statute, 8 U.S.C. § 1229a, and this statute *is* part of the relevant subchapter of the INA. Section 1229a(a)(1) confers on immigration judges the plenary authority to conduct removal proceedings; § 1229a(b)(1) describes that authority in general terms (it provides, for example, that the immigration judge has the authority to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses" and "issue subpoenas"). The regulation pertaining to continuances implements these statutes, but the immigration judge's *authority* to conduct and control the course of removal proceedings is "specified in" subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings, whether on the motion of a party or sua

sponte. The jurisdictional bar therefore applies to continuance decisions.

We suggested this interpretation in *Subhan* but did not affirmatively adopt it. 383 F.3d at 595 (noting that § 1229a authorizes immigration judges to conduct removal proceedings and observing that "since orders denying motions for continuances, like other orders governing the management of trials, are traditionally and indeed inevitably discretionary in character[,] . . . it is apparent that section 1252(a)(2)(B)(ii) withdraws from the courts the power to review such rulings when made by an immigration judge"). We now do so. There is a circuit split on this question, and we recognize that we are aligning ourselves with the minority view. The Eighth and Tenth Circuits have adopted the same interpretation as we do here. *See Yerkovich v. Ashcroft*, 381 F.3d 990, 993-95 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). The First, Second, Third, Fifth, Sixth, and Eleventh Circuits have accepted the interpretation now asserted by the Attorney General. *See Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. Att'y Gen.*, 461 F.3d 1357, 1360-62 (11th Cir. 2006); *Khan v. Att'y Gen.*, 448 F.3d 226, 232-33 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-37 (5th Cir. 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 198-99 (2d Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 633-34 (6th Cir. 2006). The majority position, however, cannot be reconciled with our recent opinion in *Leguizamo-Medina*.

The alien in *Leguizamo-Medina* had sought a continuance in order to present more testimony on her claim for cancellation of removal. Her motion

was denied and she petitioned for judicial review. The jurisdictional bar at issue in *Leguizamo-Medina* was § 1252(a)(2)(B)(i), the subsection preceding the statute at issue here. Section 1252(a)(2)(B)(i) eliminates judicial review of "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title." The listed statutes pertain to the Attorney General's authority to make decisions regarding waiver of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status. Because § 1252(a)(2)(B)(i) "puts the [cancellation of removal] decision beyond review," we held that the statute also "insulates the choices leading up to that decision," including the continuance decision. *Leguizamo-Medina*, 493 F.3d at 775. "When a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion." *Id.* (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, ___ U.S. ___, 127 S.Ct. 2411, 2419, 168 L.Ed.2d 112 (2007); *Daniels v. Liberty Mut. Ins. Co.*, 484 F.3d 884, 887-88 (7th Cir. 2007)).

Here, Ali sought a continuance in order to pursue adjustment of status if his son naturalized. Of course we are not reviewing a final decision denying adjustment of status (the case never got that far), but Ali's continuance motion was ancillary to his contemplated petition to adjust status—that is, it was a procedural step along the way to an

unreviewable final decision—and the denial of the motion is therefore unreviewable.[3]

This leaves us to consider whether Ali's case falls within the exception noted in *Subhan*. It does not. The BIA affirmed the IJ's denial of a continuance based on evidence in the record indicating that Zeeshan's citizenship application had already been denied; this is a reason consistent with the adjustment statute, not merely a "statement of the obvious." The "walk-in" form Zeeshan submitted to Senator Durbin's office stated that he had been denied citizenship "on poor moral character." The BIA was entitled to rely on this evidence—which was introduced, after all, by Ali himself.

Ali protests, however, that Zeeshan's citizenship application remains viable, despite the contrary written evidence he submitted to the IJ. At oral argument, Ali's counsel confirmed that Zeeshan's first application indeed was denied on moral

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[3] Final orders of removal such as the one before us are generally reviewable pursuant to 8 U.S.C. § 1252(a)(1), but this general review authority is subject to the jurisdiction-stripping provisions in subsection (a)(2) of that statute, two of which we have been discussing here. The prefatory language in § 1252(a)(2)(B) states, in pertinent part: "Notwithstanding any other provision of law (statutory or nonstatutory) ... and *regardless of whether the judgment, decision, or action is made in removal proceedings*, no court shall have jurisdiction to review ...." (emphasis added). Subsections (i) and (ii), under consideration here, immediately follow this language. We note also that Ali conceded removability; his petition for review challenges only the denial of his continuance motion and the constitutionality of the NSEERS program.

character grounds.[4] Counsel represented, however, that Zeeshan was able to reapply within five years and has done so. At the time of oral argument, no action had been taken on the second application. Ali's counsel also told us that all three of Ali's sons have pending citizenship applications. And after oral argument Ali's attorney sent us a copy of a Notice of Action on the citizenship application for Haris Ali, one of Ali's sons, scheduling an appointment for March 23, 2007. This form was unaccompanied by any explanation as to its significance for the case before us, although we assume that Ali would like to try to adjust his status based on Haris's citizenship if it is granted.

These developments are beside the point, however. At the time the BIA reviewed the denial of the continuance, the only record evidence concerning Zeeshan's citizenship application indicated that it was denied. To the best of the BIA's knowledge, it would have been futile to grant a continuance. *See Pede v. Gonzales*, 442 F.3d 570, 571 (7th Cir. 2006) (holding that "ultimate hopelessness" of application for adjustment of status is "perfectly acceptable basis" for denying continuance). Because the denial of a continuance did not have the effect of nullifying

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[4] The Attorney General, however, represented that Zeeshan's application was dismissed for lack of prosecution after he failed to file documents pertaining to his criminal history (which, according the Attorney General, includes more than one criminal charge). Also, Zeeshan failed to prosecute the administrative appeal of the denial of his citizenship application, and the appeal was dismissed.

the statutory opportunity to adjust status, the *Subhan* exception to the jurisdictional bar does not apply.[5]

Finally, Ali raises a constitutional challenge to the NSEERS program that caused him to come to the attention of the DHS. Ali contends that he was unconstitutionally targeted for registration and removal based on his religion and ethnicity. But we have held that under 8 U.S.C. § 1252(g), we lack jurisdiction to review a challenge to the constitutionality of the NSEERS program. *See Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006). Section 1252(g) bars federal courts from hearing claims "by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings." Accordingly, selective prosecution claims by aliens are largely barred. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); *Hadayat*, 458 F.3d at 665; *Ahmed*, 447 F.3d at 439-40. Although a narrow exception remains for certain "outrageous" cases, *see Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491, 119 S.Ct. 936, Ali's bare allegations of discrimination are insufficient to invoke that exception. *See Hadayat*, 458 F.3d at 665.

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[5] Insofar as Ali contends that he could also adjust his status because Zeeshan (and apparently his other sons) had a green card, he is simply incorrect. A legal permanent resident may sponsor a spouse or an unmarried child but not a parent. *See* 8 U.S.C. § 1153(a)(2).

For the foregoing reasons, Ali's petitions for review are DISMISSED for lack of jurisdiction.

U.S. Department of Justice

Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

File: A95 925 079 – Chicago Date: Sep. 28, 2006

In re: SYED IQBAL ALI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Christopher W. Helt, Esquire

ON BEHALF OF DHS:
Seth B. Fitter
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]-
In the United States in violation of law

Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)]-
Nonimmigrant – violated conditions of status

APPLICATION: Reconsideration

The respondent moves to reconsider our decision dated July 27, 2006, denying his motion to remand, and dismissing his appeal, but granting him the privilege of voluntary departure.

The Department of Homeland Security opposes the respondent's motion and contends that the respondent is merely reiterating the same contentions he made in his appeal and motion to

remand. We agree. A motion to reconsider must state the reasons for reconsideration, be supported by pertinent case precedent and be predicated on a legal or factual defect in the most recent decision. *See* 8 C.F.R. § 1003.2(b)(1); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change in law, or an argument or aspect of the case that was overlooked. *Matter of Cerna, supra.* The respondent is merely rearguing the merits of his appeal and motion to remand. *See also Rehman v. Gonzales*, 441 F.3d 506, 508 (7th Cir. 2006). We do, however, address one point raised by the respondent in the instant motion. The respondent contends that the Board erred in noting that it appeared from the record that his son may have been denied naturalization for lack of good moral character (or in discretion) due to a criminal offense. However, that observation was made in the context of the respondent's appeal and his motion to remand. The respondent contended in his motion to remand that his son would be naturalized shortly.[1] We also pointed out that the respondent had almost 2 years while in removal proceedings before the Immigration Judge to proceed with an adjustment of status application. Under these circumstances, we found that it was reasonable for the Immigration Judge to have determined that the respondent had

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[1] The respondent has never directly addressed the accuracy of the observation that his son may have been denied naturalization for lack of good moral character (or in discretion) due to a criminal offense.

ample time to pursue his adjustment application, that it did not appear that the respondent would be eligible to adjust his status in the near future, the respondent could apply for consular processing abroad, and that, therefore, the respondent had not presented good cause for a continuance. We also denied the motion to remand. The respondent also asks for an extension of his grant of voluntary departure. We cannot do so since we previously granted the respondent 60 days of voluntary departure in our last decision; moreover, we are also prohibited from reopening solely to grant reinstatement of voluntary departure. *See* 8 C.F.R. § 1240.26(h). *See also Matter of A-M-*, 23 I&N Dec. 737, 742-44 (BIA 2005). Accordingly, the motion will be denied.

ORDER: The motion is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

File: A95 925 079 – Chicago Date: Jul. 27, 2006

In re: SYED IQBAL ALI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Christopher W. Helt, Esquire

ON BEHALF OF DHS:
Anastasie M. Senat
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]-
In the United States in violation of law

237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)]-
Nonimmigrant - violated conditions of status

APPLICATION: Adjustment of status; continuance

ORDER:

PER CURIAM. With the following additions, we adopt and affirm the decision of the Immigration Judge which denied the respondent's request for a continuance to await the adjudication of his son's naturalization application because ample time had already been provided, it did not appear that the respondent would be eligible to adjust his status in

the near future, and consular processing is available to the respondent.[1] *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"); *cf. Subhan v. Ashcroft,* 383 F.3d 591 (7th Cir. 2004) (failure of Immigration Judge to provide *any reason* for denial of continuance violated section 245(i) of Immigration and Nationality Act, 8 U.S.C. § 1255(i)).

We cannot agree with the respondent's argument that he falls within the dictates of *Subhan v. Ashcroft, supra.* Although the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this matter arises, found that a denial of a continuance request without providing a reason consistent with the statute[2] is improper, the court clarified that denying a continuance because the alien "dragged his feet" or even because "an illegal alien should not be allowed to delay his removal beyond a year" would suffice. *See Subhan v. Ashcroft, supra,* at 593-594. In this matter, the respondent had almost 2 years while in removal

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[1] The respondent sought to adjust his status to permanent resident as the father of his *naturalized* United States citizen son, but his son has not successfully naturalized. *Cf.* Immigrant Petition for Relative (Form I-130) Receipt Notice, dated January 7, 2005 ("Parent of U.S. Citizen").

[2] In *Subhan, no reason at all* was provided for the denial of a continuance.

proceedings before the Immigration Judge to proceed with an adjustment of status application. It also appears from the record that the respondent's son may have been denied naturalization for lack of good moral character (or in discretion) due to a criminal offense. *See* Senator Durbin Walk in form, dated February 22, 2005 (apparently signed by respondent's son); Form I-130 Receipt Notice (Petitioner: Syed Z. Ali). Under these circumstances, we find it reasonable for the Immigration Judge to have determined that the respondent had ample time to pursue his adjustment application, that it did not appear that the respondent would be eligible to adjust his status in the near future, the respondent could apply for consular processing abroad,[3] and that, therefore, the respondent had not presented good cause for a continuance. *See, e.g., Pede v. Gonzales*, 442 F.3d 570 (7th Cir. 2006) (ultimate hopelessness of adjustment application sufficient reason to deny continuance). We also note that administrative closure is inappropriate where either party, here the DHS, opposes it. *See Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996) (administrative closure used to temporarily remove case from Immigration Judge's calendar or Board's docket; cases may not be administratively closed if opposed by either party).

The respondent also argues that he falls within the dictates of *Matter of Velarde-Pacheco*, 23 I&N Dec.

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[3] *But see* section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) (waiver requires hardship to LPR or USC *spouse or parent*; applicability of section determined during consular processing).

253 (BIA 2002). We find the respondent's circumstances distinguishable from those in *Velarde*, in which we held that a proper motion to reopen for adjustment of status based on a marriage entered into subsequent to the commencement of proceedings may be granted discretionarily, under specific circumstances, despite the pendency of the relative visa petition. *See also Pasha v. Gonzales*, 433 F.3d 530, 534 (7th Cir. 2005) (citing *Verlarde* for proposition that Board would have granted motion and stayed removal only if government had not objected to reopening). As this matter does not involve a motion to reopen based on a marriage entered into during the course of these removal proceedings that the Department of Homeland Security (DHS) has not objected to, *Velarde-Pacheco, supra*, is inapplicable. The respondent has additionally contested his removability. *See* Respondent's Brief at 9.[4] However, the respondent already admitted the allegations and conceded the charge listed in the Notice to Appear (Tr. at 3; Exh. 1).

Finally, the respondent has challenged, on appeal, the grant of voluntary departure. *See* Respondent's Brief at 3. As the respondent sought voluntary departure and proffered his eligibility for this form of relief from removal, we find that the respondent was appropriately accorded voluntary departure (Tr. at

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[4] The respondent's appellate briefs, filed on January 10, 2006, and June 5, 2006, are almost identical substantively. All references in this decision to the respondent's brief refer to the brief filed on January 10, 2006.

16-18). We note, however, that at the *conclusion* of proceedings an alien may only be provided 60 days of voluntary departure, whereas the Immigration Judge provided this respondent 120 days (Tr. at 17). *See* section 240B(b)(2) of the Act. 8 U.S.C. 1229c(b)(2); *cf.* 8 C.F.R. § 1240.26(b) (*pre*-conclusion voluntary departure requires waiver of appeal). Accordingly, voluntary departure will be reinstated for 60 days by this Board.

Hence, the respondent's requests for oral argument and for a remand are denied, and the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under

section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

FOR THE BOARD

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Chicago, Illinois

File No.: A 95 925 079 February 24, 2005

In the Matter of

SYED IQBAL ALI,
Respondent

IN REMOVAL PROCEEDINGS

CHARGES: Section (a)(1)(B) of the INA, remained longer than allowed; and Section 237(a)(1)(C)(i) of the INA, failed to maintain conditions of the non-immigrant status under which you were admitted.

APPLICATION: Motion to continue

ON BEHALF OF RESPONDENT:
Christopher Helt, Esquire
325 West Sheran Street
Suite 515-A
Chicago, Illinois 60610

ON BEHALF OF DHS:
Lynn Hollander, Esquire
Assistant Chief Counsel
Chicago, Illinois

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult male, native and citizen of Pakistan who arrived in the United States back on February 3rd, 1996 as a non-immigrant visitor. At that time, based on representations which the respondent made to the U.S. Consulate abroad, he

was given permission to remain in the United States for a temporary period not to exceed August 2, 1996. The respondent made representations to the Consulate officers that he would come back to his home country of Pakistan.

Because the respondent never did, the Department commenced the removal proceedings on March 17, 2003 by issuing a Notice of Appear charging the respondent as being removable pursuant to the above-captioned sections of the Immigration and Nationality Act (the Act).

The respondent appeared with counsel at his removal hearing and requested time in order to seek the privilege of adjusting his status to lawful permanent residency in the United States. The respondent's first hearing was scheduled for April 24, 2003 at 1:00 p.m. At that time the respondent did appear with the assistance of counsel and asked for some additional time.

The respondent's request was granted. The respondent was then scheduled to appear on November 4, 2003 at 9:00 a.m. On that date the respondent did appear and entered a pleading essentially admitting the allegations contained in the Notice to Appear and conceding removability on both grounds as charged.

Consequently, removability has been established by clear and convincing evidence. 8 C.F.R. Section 204.80 (2004).

The respondent made representations to this Judge that he asked for one prolonged period of time within which to attempt to have a visa issued to him. The respondent also made representations that he

might seek the opportunity of filing for political asylum despite the fact that he had not filed within one year of his entry as required by the regulations. 8 C.F.R. Section 1208.1 (2004).

At his hearing on February 24, 2005, the respondent again appeared and asked for more time within which to attempt to have a visa issued to him. The respondent, through counsel, submitted a copy of a request for a continuance or to administratively close his case. The Department submitted a motion or response in opposition to the respondent's request indicating that the respondent was not eligible for a visa because he did not have one immediately available to him based on his categorical status.

The respondent does not dispute that he is not immediately eligible for a visa. The respondent does assert that his qualifying family member (son) is in the process of naturalizing his status in the United States. However, the respondent, through counsel, concedes that there is no definitive date scheduled for any naturalization.

The Government opposes administrative closure in part because the respondent does not have available to him a visa. It is not within the regulations or the Government's operating instructions to close matters under these situations. Consequently, it is the Department's position that they would oppose the respondent's request to administratively close.

The respondent has requested an opportunity to continue the matter. At the outset the Department indicated that it might be willing to consider joining in an continuance given the fact that respondent's attorney apparently has a conflict.

However, the respondent's attorney is present in court. His conflict consists of attending an Immigration Lawyer's Association Conference locally. Given the fact that the respondent's attorney is present and there is no, in the view of this Court, harm to the respondent because the respondent is not eligible for any immigration benefit other than to leave voluntarily. Consequently, the request to continue is denied.

The regulations do allow for a continuance if there is "good cause" (citation omitted). Given the fact that the respondent was already given almost two years to remain in the United States in order to get a head start towards his visa, and given the fact the respondent is not immediately eligible for a visa, and the prospects of having a visa immediately available to him are unclear and at least possibly months to years away, this Judge has denied the respondent's request because this does not constitute good cause.

The immigration system is set up in order for individuals such as the respondent to consular process. In other words, the respondent is eligible to return to Pakistan and await his visa as the system was intended. Given the fact that the respondent is not eligible in any foreseeable point, the respondent's continuance has been denied and the following order will be entered.

ORDER

IT IS ORDERED that the respondent's continuance will be denied as there is no good cause.

IT IS FURTHER ORDERED that the respondent's request for voluntary departure will be granted to the extent that the respondent will be required to leave

the United States by June 28, 2005 upon the posting of a $2,500 bond to insure his departure.

IT IS FURTHER ORDERED that if the respondent does not depart the United States by June 28, 2005, or if he does not post a $2,500 bond within five business days, this order will be converted without further notice or proceeding to an order of removal and deportation from the United States to Pakistan on the charges contained in the Notice to Appear.

Date: February 24, 2005

CARLOS CUEVAS
Immigration Judge

United States Code

Title 8. Aliens and Nationality

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part V. Adjustment and Change of Status

Section 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of

removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter

(other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an

appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) **Treatment of nationality claims**

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a

motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) **Challenge to validity of orders in certain criminal proceedings**

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality

is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of

the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any

action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition

of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Code of Federal Regulations

Title 8. Aliens and Nationality

Chapter V. Executive Office for Immigration Review, Department of Justice

Subchapter A. General Provisions

Part 1003. Executive Office for Immigration Review

Subpart C. Immigration Court--Rules of Procedure

Section 1003.29 Continuances.

The Immigration Judge may grant a motion for continuance for good cause shown.

NOS. 06-3240 & 06-3879
(consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SYED IQBAL ALI,
A95 925 079,
Petitioner,

v.

ALBERTO R. GONZALES,
United States Attorney General,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF ADDRESSING WHETHER THE COURT HAS JURISDICTION TO REVIEW PETITIONER'S CLAIM THAT THE BOARD AND IMMIGRATION JUDGE ABUSED THEIR DISCRETION IN DENYING PETITIONER'S REQUEST FOR A CONTINUANCE

INTRODUCTION

The respondent files this Supplemental Brief to address whether the Court has jurisdiction to review whether the Board and immigration judge abused their discretion in denying Petitioner's request for a continuance, as directed by the Court at oral argument on February 22, 2007. After carefully considering the legal question of whether such review is foreclosed by Immigration and Nationality Act (INA) § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), the respondent has concluded that discretionary

rulings arising from regulatory provisions, rather than specified statutory grants of discretion, do not fall within the jurisdictional bar. *See* Respondent's Brief at 8 n.4. Because an immigration judge's discretionary authority to continue a removal proceeding derives from the regulations, and is not expressly conferred by any INA provision, the respondent withdraws its argument, made in earlier cases before the Court, that review of a continuance denial is foreclosed by section 242(a)(2)(B)(ii). As stated in the respondent's answering brief in this matter, the respondent believes that the Court has jurisdiction to review the immigration judge's discretionary denial of petitioner's request for a continuance of his removal proceeding.

ISSUE PRESENTED

Whether the Court should follow the approach of the majority of circuits and hold that it has jurisdiction to consider whether the immigration judge acted within his discretion, as conferred by the immigration regulations, in denying petitioner's request for a continuance of his removal proceeding.

ARGUMENT

A. Standard of Review

The Court reviews questions regarding its subject matter jurisdiction *de novo*. *Samirah v. O'Connell*, 335 F.3d 545, 548 (7th Cir. 2003).

B. An Immigration Judge's Discretionary Denial of A Request for A Continuance Does Not Fall Within The Jurisdictional Bar of 8 U.S.C. 5 1252(a)(2)(B)(ii).

The respondent had previously urged the Court to follow decisions of two sister circuits, the Eighth and

the Tenth Circuits, to hold that it lacked jurisdiction to review a discretionary denial of a continuance in an immigration case.[1] This Court has indicated in *dicta* that it generally lacks jurisdiction to review a discretionary denial of a continuance in an immigration case. *Ahmed v. Gonzales*, 465 F.3d 806, 809 (7th Cir. 2006); *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005); *Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004). Specifically, in *Subhan*, the Court discussed two possible jurisdictional theories, *id.* at 594-95, but concluded that:

> Supposing, therefore, though *without having to decide*, that section 1252(a)(2)(B)(ii) generally bars judicial review of a continuance granted by an immigration judge in a removal proceeding, we nevertheless think it unlikely that Congress, intending, as it clearly did, to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from the state and federal labor departments, at the same time also intended section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the statute.

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[1] The Tenth and Eighth Circuits held that INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), which bars federal court review of discretionary decisions made by the Attorney General in immigration proceedings, precludes review of an immigration judge's discretionary decision to deny a continuance. *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004).

Id. (emphasis added); *see also Benslimane*, 430 F.3d at 832 ("We assume, as we did in *Subhan v. Ashcroft*, *supra*, 383 F.3d at 595, that the government's [jurisdictional] argument is correct in general."), *and Ahmed*, 465 F.3d at 809 (citing *Subhan* and the statute for the proposition that "we are barred from reviewing most discretionary decisions, including the denial of a continuance by an IJ."). In each case, however, the Court found that it had jurisdiction to review the continuance denial because the immigration judge's decision was deemed inconsistent with the statutory scheme.

The jurisdictional provision states:

> no court shall have jurisdiction to review . . . (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. § 1151 through 1378 and pertains broadly to immigration matters. *See Van Dinh v. Reno,* 197 F.3d 427, 433 (10th Cir. 1999). The *Yerkovich* and *Onyinkwa* courts reasoned that an immigration judge's authority to grant a continuance request is covered by section 242(a)(2)(B)(ii), because it derives from regulations which the Attorney General promulgated to implement INA §§ 240(a)(1) and (b), 8 U.S.C. §§ 1229(a)(1) & (b), which, in turn, authorize

immigration judges to conduct removal proceedings.[2] Such regulations are issued "under" the relevant "subchapter" of the Act referred to in 8 U.S.C. § 1252(a)(2)(B)(ii).

The majority of circuits, however, have rejected the jurisdictional holdings of the Eighth and the Tenth Circuits with respect to discretionary continuance denials. The Second, Third, Fifth, Ninth, and Eleventh Circuits have concluded that a decision by an immigration judge to grant or deny a continuance is not a decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General."[3] 8 U.S.C. § 1252(a)(2)(B)(ii). Those courts have held that the jurisdictional bar applies only if a statutory provision within subchapter II itself, not a regulation issued under that subchapter, gives the Attorney General discretionary authority to act or decide an issue. *See Sanusi v. Gonzales*, 445 F.3d 193, 198-99 & n.8 (2d Cir. 2006); *Khan v. Attorney General*, 448 F.3d 226, 231-32 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-37 (5th

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[2] The regulations authorize immigration judges to "regulate the course of the [removal] hearing [,]" 8 C.F.R. § 1240.1(c), including "grant[ing] a motion for continuance for good cause shown," 8 C.F.R. § 1003.29.

[3] In its jurisdictional discussion in *Subhan*, 383 F. 3d at 595, this Court analyzed the phrase "any other decision or action of the Attorney General[.]" 8 U.S.C. § 1252(a)(2)(B)(ii). In contrast, the majority of the courts' and the Attorney General's analysis on this issue focuses on the phrase: "the authority for which is specified under this subchapter to be in the discretion of the Attorney General[.]" *Id.*

Cir. 2006); *Zafar v. Attorney General*, 461 F.3d 1357 (11th Cir. 2006) (same); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004).[4] *See also Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632, 634 (6th Cir. 2006) (reaching the same result through a different analysis).

After considering the issue in light of the developments in the courts, the respondent has concluded that the majority position that review is not precluded is the better reading of the statute, and is correct. The relevant statutory text requires that the "authority" for the "decision or action" at issue – be "specified under this subchapter [subchapter II of Chapter 12, of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, let alone indicates

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[4] The Ninth Circuit has not issued a published decision specifically considering whether section 242(a)(2)(B)(ii) bars judicial review of an immigration judge's discretionary denial of a continuance. However, the Ninth Circuit's decision in *Medina-Morales*, which considered the reviewability of a discretionary denial of a motion to reopen, forecloses any argument that section 242(a)(2)(B)(ii) applies in the context of a discretionary denial of a continuance. *Medina-Morales* squarely held that section 242(a)(2)(B)(ii) "applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines." 371 F.3d at 528. Because an immigration judge's discretion to continue a removal hearing derives from the immigration regulations, and not directly from the INA, *Medina-Morales* controls the jurisdictional analysis here, and precludes any argument in the Ninth Circuit that section 242(a)(2)(B)(ii) divests federal courts of jurisdiction to review discretionary continuance denials.

that they are granted "in the discretion of the Attorney General." Given the precision with which Congress spoke in section 242(a)(2)(B)(ii), we now conclude that this jurisdiction-limiting provision does not extend to exercises of discretion by immigration judges that are not specified anywhere in the statutory subchapter.[5]

As the Fifth Circuit observed:

> One might mistakenly read § 1252(a)(2)(B)(ii) as stripping us of the authority to review any discretionary immigration decision. That reading, however, is incorrect, because § 1252(a)(2)(B)(ii) strips us only of jurisdiction to review discretionary authority *specified in the statute*. The statutory language is uncharacteristically pellucid on this score; it does not allude generally to "discretionary authority" or to "discretionary authority exercised *under this statute*," but specifically to "authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.

Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005). An immigration judge's authority to continue a case simply is not "specified under" the subchapter to be

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[5] Indeed, despite their holdings that section 242(a)(2)(B)(ii) bars review of discretionary denials of continuances, the authority for which derives from the immigration regulations, both the Eighth and the Tenth Circuits agree that courts may review the Attorney General's exercise of discretion to grant or deny a motion to reopen, even though such discretion is also conferred by the regulations, and not the statute. *See, e.g., Hailemichael v. Gonzales*, 454 F.3d 878, 882 (8th Cir. 2006); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004).

in the discretion of the Attorney General; instead, it derives from regulations promulgated to implement statutory provisions that broadly authorize immigration judges to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. *See* INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). Therefore, an immigration judge's discretionary decision to deny a continuance is not covered by the jurisdictional bar in section 242(a)(2)(B)(ii).

Over the past two months, the Government has submitted letter briefs and other filings in other courts of appeals, in which it has stated that the Government no longer asserts that judicial review of denials of continuances is precluded by section 242(a)(2)(B)(ii). The Solicitor General has concurred in that position. Accordingly, the Government withdraws its argument, made in prior cases, that section 242(a)(2)(B)(ii) bars review of discretionary denials of continuances, and urges the Court to consider Petitioner's challenge to the immigration judge's exercise of discretion in denying his request for a continuance.

CONCLUSION

For the foregoing reasons, the Court should hold that it has jurisdiction to review the immigration judge and Board's denials of petitioner's request for a continuance.

Respectfully submitted,

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Dated: March 1,2007

United States Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of
SYED IQBAL ALI,

Respondent

File A 95 925 079
In Removal Proceeding

Transcript of Hearing

Before CAROLS CUEVAS, Immigration Judge
Date: April 24, 2003 Place: Chicago, Illinois
Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland
Official Interpreter:
Language:
Appearances:
For the Department of Homeland Security:
For the Respondent: Pro Se

JUDGE FOR THE RECORD

We're on the record April 24, 2003. Immigration Judge Carlos Cuevas in Chicago with the case Syed Iqbal Ali, A 95 925 079. And Mr. Hassan, first name S-H-E-H-R-Y-A-R, A 95 925 204. Now, they are present. Currently Mr. Christopher Helt (phonetic sp.) has—he's not present, however, he submitted a Notice of Appearance indicative of his intent to represent both respondents.

JUDGE TO RESPONDENTS

Q. To the respondents, beginning with dad, tell us your full name, sir. What's your full name?

A. Syed Iqbal Ali.

Q. And do you still live in Skoli (phonetic sp.), Illinois?

A. Yes.

Q. 4248 Howard?

A. Yes.

JUDGE TO MR. HASSAN

Q. Your name, sir?

A. Shehryar Hassan.

Q. And you live at 6541 North California?

A. Yes.

Q. And you want Mr. Christopher Helt to represent you?

A. Yes.

Q. All right. I'll have you come back on November 4, 2003 at 9 o'clock, November 4. We'll give you a notice with the date and the time. You must come back even if Mr. Helt does not come back with you. Because if you fail to come back, I will have to move ahead without you and enter an order of removal and deportation against you.

A. Okay.

Q. All right? If that happens, you could not get permanent residency for ten years. I'll give you the notice on here. Anything else?

JUDGE TO DHS ATTORNEY

Q. Anything from the Service?

A. No, thank you.

JUDGE FOR THE RECORD

The hearing is continued.

HEARING CONTINUED

United States Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of	File A 95 925 079
SYED IQBAL ALI,	In Removal Proceeding
Respondent	Transcript of Hearing

Before CAROLS CUEVAS, Immigration Judge

Date: November 4, 2003 Place: Chicago, Illinois

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Department of Homeland Security:	For the Respondent: Pro Se
John Gountanis, Esquire	Christopher Helt, Esquire

JUDGE FOR THE RECORD

November 4, 2003. Judge Cuevas in Chicago. Syed Iqbal Ali is the respondent represented by Christopher Helt. For the Government by John Gountanis.

JUDGE TO MR. HELT

Q. Mr. Helt, how do you plead?

A. Your Honor, we admit the allegations, concede removability, designate Pakistan. As an alternative form of relief, the respondent's son has a pending NATS (phonetic sp.) application. I have a fingerprint notice dated April 11th, 2003. I'm presuming that his NATS interview will be very soon. At that time we would be filing an I-130 and requesting (indiscernible).

Q. Well, why don't you just deal with the citizen spouse? If he's not eligible for any relief, I'm not going to continue it for the possibility that this son is going to NATS at some time in the future. I'm not going to do that.

A. Well, I have (indiscernible) verification. I would think that it would probably within the next few days because this is dated—

Q. He has not filed an I-130, right? There is no basis for (indiscernible)? I'm not continuing—he came in a second batch of these cases. The first batch and I have not continued the cases. And in some instances similar to this. If they—I'm having status calls on Tuesday mornings instead of my regular Thursday afternoon because I'm out of time. I've got no place to put these. I'm not going to continue a case for a year, a year and a half. I mean if the Government is willing to administratively close, I'll consider that. But I'm not, you know—

MR. GOUNTANIS TO JUDGE

Q. No, Judge.

MR. HELT TO JUDGE

Q. Well, I'd like to make a request for ad. closure then. If the Court is not willing to entertain a long

continuance, a (indiscernible) continuance. then I'll make a request and then come back with the decision.

A. You're going to ask him right now? I mean he's the Government.

MR. GOUNTANIS TO JUDGE

Q. Well, the Government would not admin. close this kind of case. No, Judge.

JUDGE TO MR. HELT

Q. If you'd like, I can pass the case and you can speak with him about—

A. Well, I would like to make the request directly with the Chief Counsel's office.

Q. Okay. Well, you can do that. But I'm not going to—I mean I'll pass the case and you can take the chance that I'll be here when you come back, but I'm not waiting for you.

A. Yes, Judge.

Q. I'm not setting this matter over another, you know, another day or segment of the day because I've set aside the morning to deal with these cases.

A. And that's fine, Judge. I understand that you have a docket and you have a large number of cases. And we would request in addition to adjustment of status based on an approved I-130, if the Court would be willing to do that, then we would request withholding and Convention Against Torture. The respondent is a native and citizen of Pakistan. He has missed the one year time limitation.

Q. By how long?

A. He's been here for seven or eight years. So 208.4 would not be applicable to him.

Q. Okay.

JUDGE TO MR. ALI

Q. Sir, I have to tell you, I have to give you notices for consequences of filing a frivolous I-589. That's the application for asylum. Before you file that, Section 208(b)(4) of the Immigration Act requires that I tell you about the consequences of knowingly filing a frivolous application for asylum in the United States. If you knowingly file a frivolous application for asylum in the United States, you will be barred forever from receiving any benefits under the Immigration Act. So if you file an application that I find contains lies, fabrications, I will bar you forever from receiving any benefits and that means that residence to your son, through under any provision under the Act, you could not come back as a visitor if I find that you have submitted an application that's frivolous. Do you understand?

A. Yes.

Q. I'll give you a copy of the consequences that I'm required to. And let me go off the record and I'll get you a date.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record.

JUDGE TO MR. ALI

Q. I'll schedule this for February 24th, 2005 at 9:00 a.m.

JUDGE TO MR. HELT

Q. Which language the respondent speaks best?

A. Urdu, Your Honor.

Q. All documents, supplemental documents in by February 14, '05 and have him reprinted October of '04. Provide you with the notice with the date and time and does have the consequence of failing to appear. I'll give you written notice. You will have those explained to him?

A. Yes, Your Honor.

Q. All right.

JUDGE FOR THE RECORD

The hearing is continued.

HEARING CONTINUED

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of	File A 95 925 079
SYED IQBAL ALI,	In Removal Proceeding
Respondent	Transcript of Hearing

Before CAROLS CUEVAS, Immigration Judge

Date: February 24, 2003	Place: Chicago, Illinois

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Department of Homeland Security:	For the Respondent:
Lynn Hollander, Esquire	Christopher Helt, Esquire

JUDGE FOR THE RECORD

On the record. It's February 24, 2005. Immigration Judge Carlos Cuevas with the case of Mr. Syed Iqbal Ali, A 95 92s 079. He's represented by Christopher Helt. The Government is represented by counsel, Ms. Lynn Hollander. I had scheduled this on the merits of the respondent's request for relief. I played part of

the record back and I did indicate that the respondent was to file any and all forms of relief and I do have a request to administratively or to continue or administratively close proceedings and I did receive a Government response in opposition to that.

JUDGE TO MS. HOLLANDER

Q. Ms. Hollander, is it still—well, what is the Government's position?

A. Well, Judge, what is stated in that response is our position. Mr. Helt today had asked me, because he has a conflict about continuing the case, and due to an (indiscernible) matter which I had told him I was not going to oppose that for one continuance. But not for a permanent continuance while an I-130 is pending. And I understand that given the Court's schedule, that would be difficult to do.

Q. Well, I guess my point—well, Mr. Helt is here. My issue really goes to whether the Government would like to administratively close.

A. Right.

Q. Because we could administratively close if you don't oppose it.

A. I do oppose that. I don't think that there is justification to do that. To take it off the calendar when it's been pending that long since '03.

Q. All right. Well, it is my – it depends on the basis for the administrative closure.

JUDGE TO MR. HELT

Q. It's my understanding, Mr. Helt, that the respondent, Mr. Ali—and I can't quite tell frankly from your motion to continue or administratively

close whether he's immediately eligible for a visa or not. What is the category?

A. He's not. He's not immediately eligible because his son, the petitioner, is not a citizen. Once he becomes a citizen, then yes he would be immediately eligible to obtain a green card before Your Honor. So based on that and the fact that the son has a pending application for citizenship, and has today presented documentation evidencing that he has actually congressional intervention or a congressional inquiry letter from Senator Durbin's office, which I have date stamped here and I would be happy to provide a copy to the Court and to the Government, which evidences that it may an expedited situation.

We understand that the Government is against probably administratively closing and I can understand that because obviously if the son does not become a U.S. citizen, then he wouldn't be eligible to—he wouldn't be able—this respondent wouldn't be able to immediately adjust. However, based on these facts alone. Judge, I think that a continuance and I do acknowledge the fact that this matter has been continued previously, I don't think that a grant of a continuance at our request at this point would be an undue burden on any party. I understand that the Court is inundated with many, many cases. I do understand that. But to tear a father from his son who they both live together, who have something viable before their eyes, I think would be unjust.

Now, I know that this Court is not a court of equity. And you're faced with the—Your Honor is faced with the situation where if a visa is not immediately available, then, of course, there is no

relief that would be available at this point. However, we think that with the changing nuances in immigration law today, your order requesting relief doesn't necessarily mean that we have to file a green card, an 1-485 application. I think that, you know, the avenues of relief or the definition of that term are expanding to include also continuances based on good faith requests. Based on viable applications which will be approved and should be approved and there is no reason why they should. not be approved in the future.

I think if the Court would like to make inquiry into the viability of this application, namely, whether the respondent is actually the biological father of the petitioner, the son, or whether there is an application pending for naturalization, these documents we've attached already in our Motion to Continue, I think these would be the point of contention. Not simply the fact that a visa is not immediately available so we would again ask the Court to exercise its previous wonderful exercise of discretion in granting these short continuances and exercise its favorable grant one more time to allow this individual to become a U.S. citizen and allow this respondent to adjust before this Court or alternatively, administratively close this matter.

We do have an agreement with the Government to continue this matter on other issue as Ms. Hollander stated. But, again, our position would be the same. With regard to the Government's response, we admit the points of contention except point number eight which says that the continuance shouldn't be granted. But I think the issue that we have here today is whether a continuance should be granted

and the Government has no objections. So if Your Honor were to deny a continuance today, Your Honor essentially would be going above the agreement that we had with the Government today. And I do understand the reason why is because Your Honor has continued this case before. But we would—

Q. Well, my understanding—let me see if I understand. What was the basis of the agreement? That you had a conflict?

A. On other issues, Judge.

MS. HOLLANDER TO JUDGE

MS. HOLLANDER TO JUDGE

Q. By the Government, counsel represented that he had an ALO conference right now.

MR. HELT TO JUDGE

Q. I have an ALO conference today.

A. Right now?

MS. HOLLANDER TO JUDGE

Q. And that was the reason—

JUDGE TO MR. HELT

Q. Well, it seems to that you're here now so I think that this is something that doesn't take any time at all. And it seems to me that you're here now.

A. Well—

Q. It 's 9:30. I don't know what time you're scheduled for something else but did you—I didn't know that you had a conflict.

A. Well, this case in Your Honor's docket is obviously more important—

Q. Did you tell me that—

A. No. It's more important than the ALO conference. But based on the ALO conference and the fact that we're here now, well into 45 minutes of my conference and there is no lunch break today at the ALO conference, it goes right through lunch, and we had an off the record discussion about whether I could come back at 5:00 or at lunch rather, and I explained to Your Honor that I could not, so, you know, I think the cumulative affect here of our request is one that's not dilatory. It's one based in good faith and I don't see any harm or prejudice of any party including the Court to give one more continuance. And I do acknowledge the fact that this matter has been continued previously.

Q. I don't want—at the risk of having the Courts of review not understanding the situation, I don't want to make it appear that I'm not willing to continue the case or deal with the case that's reasonable. But your request—if I continue the case, and I've continued the case based on your similar assertion a year, about 15 months ago, and he's still not ready. Now, I'm not denying continuances willy nilly, using the 7th Circuits own words. And I fully understand that the case and in particular *Shubon v. Ashcroft* (phonetic sp.), has gone up and dealt with motions to continue.

This case is distinguished from the facts in *Shubon*. This man as he sits here today it's undisputed he is not immediately eligible for a visa. I've given him a year. He's been under proceedings since March of 2003. He is one month short of two full years being under proceedings. He is unlawfully in the United States. I understand he's got family

ties. Everyone who appears before me has family ties in the United States. Everyone.

He is no different than anyone else. He's benefited by having me continue the case for one month short of two years. There is no reason to continue the case any further for the adjustment application because he's not ready. The regulations at 8 C.F.R. 1245.1 talk about immediate eligibility for a visa. He needs to have a visa immediately available. He doesn't. Maybe in a year. Maybe in two years but as he sits here today, he's not.

Just so the record is clear, I did you an opportunity on his behalf to file for asylum or whatever other related relief so it's not like I'm twisting your arm on this particular issue. I did advise him that there are frivolous or consequences for knowingly filing a frivolous application for asylum. He files a frivolous application and he is forever barred. He decided not to do that.

So it seems to me that he's had options. He simply is out of time. And I'm not willing to continue the case based on the fact that you got a conflict when you're sitting here. So I'm not continuing the case.

A. Well, Judge, in response—

Q. Now, I'm not continuing the case. If he's not willing to leave the United States voluntarily—we already took a pleading. And, if he's not willing to leave the United States voluntarily, I'll enter an order indicating that he should be removed from the United States.

A. Judge, may I respond to your comment? Your remark concerning the Courts of review. It's well

taken, however, we don't want this case to go to the Courts of review and this can be avoided and to use—

Q. You have a right to do that. Let me be real clear about this. I'm talking to the 7th Circuit right now. I'm talking to the panel who issued the decision in *Shoban* (phonetic sp.). I'm not shying away from it. So you do what you have to do. I'm not continuing the case. You know, if you have a point you want to make for record, that's fine. But let's move on. We're in a removal—we're into the relief stage.

A. I would like to make a point for the record because the case that you mentioned, Judge Posnor (phonetic sp,) also states, you know, it's quote from that case. He states the wheels of beaucracy turns slowly. And this is what this situation is. This respondent has a son that has filed for US citizenship. If and when his interview takes place, he would be able to request a green card before Your Honor. So essentially the rug is being pulled under this individual. He's been torn apart with viable relief in the future. This is much more straight forward than a labor certification issue where that application is for a foreign worker sometime in the future which may or may not occur, the offer of employment. This relationship—

Q. *Shoban* said it was that he had a visa immediately available to him. And it wasn't cleared by the decision in *Shoban.* That's different. And I am talking to Judge Posner. So if he wants to take the case and if he wants to give your man some additional time, that's his prerogative. I have no control over the 7th Circuit nor would I even ever attempt to exert any kind of control. But I can tell you what, your man here is not eligible for anything.

I have a thousand cases. I have more than federal district court cases. And I'm under some pressure frankly to hear cases and give people certain amount of time. Your man is out of time.

So he's got an option of either agreeing to leave voluntarily or I will order him deported and you challenge that and take it up to the 7th Circuit or the U.S. Supreme Court if you so desire. What's it going to be?

A. Well, we would request, Judge, again, that if Your Honor would deny his request for a continuance—and this is an individual hearing.

Q. Consider it denied. If I wasn't clear earlier, consider it denied.

A. Then we would request 240B(b) voluntary departure at the conclusion of essentially this hearing today. And the respondent is statutorily eligible for voluntary departure.

Q. You make representations that at the end of the case he's willing to leave and he's able to pay his way back?

A. I'd be happy to stipulate that, Judge, that the respondent.

MS. HOLLANDER TO JUDGE

Q. And by the Government, has he ever been arrested or convicted?

MR. HELT TO JUDGE

Q. Other than for ENCIRS (phonetic sp.), he's never been arrested for any crime. He has no criminal history. We would also stipulate that he has never engaged in any terrorist activities and if required to do so, he would leave by his own volition

and by his own plane ticket home or to any other country that would take him.

JUDGE TO MS. HOLLANDER

Q. Are you willing to accept that representation?

A. Yes, I am.

Q. All right.

JUDGE TO MR. HELT

Q. I'll grant the respondent voluntary departure for a period of 120 days.

JUDGE TO CLERK

Q. (Indiscernible)?

A. (Indiscernible)

Q. All right.

JUDGE TO MR. HELT

Q. A hundred and twenty days. Okay. I'll make it June 24, 2005 voluntary departure. As long as the respondent pays his way back. In the event that the respondent fails to depart when and as required, the respondent will be ordered removed and deported from the United States to Pakistan on the charges contained in the Notice to Appear.

JUDGE TO MR. ALI

Q. I'll provide you a copy of the Order. You do have a right to challenge the decision.

JUDGE TO MR. HELT

Q. What does the respondent want to do?

A. Judge, we respect your decision but we will reserve.

Q. All right.

JUDGE TO MS. HOLLANDER

Q. And the Government?

A. We'll waive appeal.

Q. All right.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. HELT

Q. Mr. Helt, I'll give you a copy of the order along with the consequences for failing to—for failing to depart as well as failing to pay the bond. Would you waive me reading those? And you will have those explained to the respondent?

A. Waive, Judge.

Q. All right. I'll show the respondent obviously reserves appeal.

JUDGE TO MS. HOLLANDER

Q. The Government would accept the decision?

A. Correct.

Q. Anything else?

A. Nothing further.

MR. HELT TO JUDGE

Q. Judge, just that document that I presented, I would like to make part of the record.

A. That's fine. It's part of the record.

JUDGE FOR THE RECORD

The hearing is closed.

HEARING CLOSED

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No. 07-798

FILED
MAR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

SYED IQBAL ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. V 2005) to review an immigration judge's denial of an alien's request to continue removal proceedings.

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In the Supreme Court of the United States

No. 07-798

SYED IQBAL ALI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 502 F.3d 659. The decisions of the Board of Immigration Appeals (Pet. App. 19a-24a) and the immigration judge (Pet. App. 25a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2007. The petition for a writ of certiorari was filed on December 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii).[1] The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151 through 1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The Attorney General has promulgated regulations that provide rules of procedure for administrative removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance

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[1] Unless otherwise noted, all citations to 8 U.S.C. 1252(a)(2)(B)(ii) are to the 2005 Supplement.

or, for good cause shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the IJs' broad discretion." *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an immigration judge, an alien must show, *inter alia*, "that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (internal quotation marks omitted).

c. The Attorney General has discretion to adjust an alien's status to that of a lawful permanent resident under certain circumstances. 8 U.S.C. 1255 (2000 & Supp. V 2005). As relevant here, the alien must be "eligible to receive an immigrant visa" and "an immigrant visa [must be] immediately available to him at the time his application [for adjustment of status] is filed." 8 U.S.C. 1255(a). A favorable exercise of discretion to adjust an alien's status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense" in lieu of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A). See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order with-

out fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

To qualify for permission to depart voluntarily at the close of removal proceedings, an alien must satisfy certain statutory conditions, including "establish[ing] by clear and convincing evidence that [he] has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1). Even if those conditions are satisfied, the decision whether to permit an alien to depart voluntarily is discretionary with the Attorney General. *E.g.*, *Garcia-Mateo* v. *Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); see generally 8 U.S.C. 1229c (2000 & Supp. V 2005).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and the alien becomes "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); 8 C.F.R. 1240.26(a).

2. Petitioner, a native and citizen of Pakistan, was admitted to the United States in 1996 as a non-immi-

grant visitor with authorization to remain in the United States for six months. Pet. App. 4a. Petitioner failed to depart the United States when required, and he has remained in this country ever since. *Ibid.*

The former Immigration and Naturalization Service (INS) charged petitioner with being removable as an alien who remained in the United States longer than permitted and failed to comply with the conditions of his visitor's visa. Pet. App. 25a-26a; see 8 U.S.C. 1227(a)(1)(B) (2000 & Supp. V 2005); 8 U.S.C. 1227(a)(1)(C)(i). Petitioner first appeared before an immigration judge (IJ) in March 2003, and his case was continued. Pet. App. 56a-58a.

In November 2003, petitioner again appeared before the IJ and conceded that he was removable as charged. Pet. App. 60a. Petitioner's counsel indicated that petitioner planned to seek adjustment of status when and if his son Zeeshan was naturalized. *Ibid.* Petitioner's counsel suggested that Zeeshan's naturalization application could be approved within a matter of days. *Ibid.* (stating that son's naturalization interview would be scheduled "very soon," "probably within the next few days"). Although the IJ expressed reluctance to continue petitioner's case in light of the fact that petitioner's son had not been naturalized, he nonetheless continued the case until February 2005 to permit petitioner the opportunity to adjust his status. *Id.* at 60a-63a. The IJ specifically warned petitioner that he was required to file all documents supporting his request to adjust status by February 2005. *Id.* at 63a.

At the February 2005 hearing, petitioner requested a further continuance because his son's naturalization application had not yet been approved. Pet. App. 66a. Petitioner's counsel admitted that petitioner was "not

immediately eligible" for adjustment of status because his son had not been naturalized, so that "there is no relief that would be available at this point." *Id.* at 66a-67a. Petitioner's counsel then presented a document that he contended "evidence[d] that" petitioner's son's naturalization application would be "expedited." *Id.* at 66a. In fact, the document suggested to the contrary; it was a form that petitioner's son had submitted to the office of Senator Richard Durbin, seeking the Senator's assistance because his application had been denied on grounds of "poor moral charact[e]r." A.R. 124; see Pet. App. 5a.

The IJ denied petitioner's request for a further continuance. Pet. App. 70a. The IJ noted that he had already "continued the case based on [counsel's] similar assertion a year, about 15 months ago, and [petitioner is] still not ready," *id.* at 69a, and that petitioner was essentially seeking "a permanent continuance" while his son attempted to obtain naturalization, *id.* at 65a. The IJ noted that, by statute, petitioner was eligible to seek adjustment of status only if he "ha[d] a visa immediately available," but petitioner did not have a visa available, even though his case had been continued "for one month short of two years." *Id.* at 70a.

Petitioner then requested voluntary departure in lieu of removal. Pet. App. 72a. Petitioner's counsel stated that petitioner was willing to leave the United States and was able to pay his way to Pakistan. *Id.* at 72a-73a. The IJ granted petitioner voluntary departure, and he noted that if petitioner failed to timely depart, he would be ordered removed. *Id.* at 73a. The IJ also noted that a consequence of failure to depart voluntarily would be that petitioner could not seek adjustment of status for ten years. *Id.* at 57a.

The IJ issued an oral decision further explaining his rulings. Pet. App. 25a-29a. He noted that although regulations "allow for a continuance if there is 'good cause,'" petitioner failed to demonstrate good cause because although he "was already given almost two years to remain in the United States in order to get a head start towards his visa," he still was "not immediately eligible for a visa" and his "prospects of having a visa immediately available to him [we]re unclear and at least possibly months to years away." *Id.* at 28a. The IJ explained that petitioner's recourse was to "return to Pakistan and await his visa as the system was intended." *Ibid.* The IJ then stated that petitioner would be permitted to depart the United States voluntarily by June 28, 2005. *Id.* at 28a-29a.

3. Petitioner appealed to the BIA, which had the effect of rendering the IJ's decision (including its grant of permission to depart voluntarily) nonfinal. See 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or expiration of the time for seeking BIA review); 8 U.S.C. 1229c(b)(1). The BIA affirmed. Pet. App. 19a-24a. It rejected petitioner's contention that the IJ erred in denying his request for a continuance, explaining that petitioner "had ample time to pursue his adjustment application," that "it did not appear that [petitioner] would be eligible to adjust his status in the near future," that petitioner "could apply for consular processing abroad," and that, "therefore, [petitioner] had not presented good cause for a continuance." *Id.* at 21a. The BIA specifically noted that petitioner "had almost 2 years while in removal proceedings before the Immigration Judge to proceed with an adjustment of status application," and that "it also appears * * * that [petitioner's] son may have been denied nat-

uralization for lack of good moral character (or indiscretion) due to a criminal offense." *Id.* at 20a-21a.

The BIA then upheld the IJ's grant of voluntary departure, noting that, by statute, petitioner would be required to depart voluntarily with 60 days of the date of the BIA's order. Pet. App. 23a; see 8 U.S.C. 1229c(b)(2). The BIA specifically warned petitioner that if he failed to depart within that time period, he would be subject to civil penalties and would "be ineligible for a period of 10 years for any further relief under" various sections of the INA, including 8 U.S.C. 1255 (2000 & Supp. V 2005), which addresses adjustment of status. Pet. App. 23a-24a.

The BIA denied petitioner's motion for reconsideration, which also had asked the BIA to extend and stay the period of voluntary departure. Pet. App. 16a-18a. It explained that petitioner "merely reargu[ed] the merits of his appeal" in his reconsideration motion, *id.* at 17a, and it noted that it could not extend the voluntary departure period beyond the time permitted by statute, *id.* at 18a.[2]

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[2] In its initial decision, the BIA stated that petitioner had challenged the IJ's grant of voluntary departure. See Pet. App. 22a (citing petitioner's BIA Br. 3). The BIA was incorrect. In petitioner's initial brief to the BIA (at 3), filed on January 10, 2006, petitioner included in the Statement of Issues Presented the following issue: "Whether The Immigration Judge Was Correct In Granting Respondent Voluntary Departure." A.R. 67. But he did not include any argument in support of the issue, let alone argue that the IJ was *incorrect* in doing so. In what appears to be a largely identical brief filed on June 5, 2006, petitioner stated, in his Summary of the Arguments (at 3), that "The Immigration Judge Was Correct In Granting Respondent Voluntary Departure." A.R. 43. And, by seeking an extension of the voluntary departure period in his motion for reconsideration (A.R. 27), petitioner obviously was not challenging the granting of that relief. Nor does

4. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-15a. As pertinent here, the court of appeals held that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review the IJ's denial of a continuance, explaining that "Section 1229a(a)(1) confers on immigration judges the plenary authority to conduct removal proceedings," and that authority "necessarily encompasses the discretion to continue the proceedings." Pet. App. 9a. The court also rejected petitioner's argument that the IJ failed to provide any reason for the continuance denial, explaining that "it would have been futile to grant a continuance" because "the only record evidence" before the IJ "concerning Zeeshan's citizenship application indicated that it was denied." *Id.* at 13a.[3]

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the IJ's denial of his request for a further continuance of his removal proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner has conceded removability, is now ineligible for the relief of adjustment of status that he previously sought, and could not in any event show that the IJ

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petitioner raise any such issue in this Court.

[3] The court of appeals also rejected petitioner's argument that he was targeted for removal by the National Security Entry-Exit Registration System based on his religion and ethnicity, Pet. App. 14a, and petitioner does not renew that argument in his petition for a writ of certiorari.

abused his discretion in denying a continuance, petitioner cannot ultimately succeed on the merits of his challenge to the removal order. The petition therefore should be denied.

1. a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit joined the Eighth and Tenth Circuits in holding that 8 U.S.C. 1252(a)(2)(B)(ii) precludes review of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. See Pet. App. 3a, 7a-11a; *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 995 (10th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. Pet. App. 9a-10a; *Yerkovich*, 381 F.3d at 993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because an IJ's discretionary authority to act on a motion

for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Attorney Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006); *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam).[4] The Sixth Circuit has reached the same result through a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri*, *supra*, discussed at pp. 12-13, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be

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[4] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in unpublished, nonprecedential opinions. See *Lim* v. *Mukasey*, No. 05-74594, 2007 WL 4562133, at *1 (Dec. 28, 2007); *Martinez* v. *Gonzales*, 166 Fed. Appx. 300 (2006); see also *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (holding that Section 1252(a)(2)(B)(ii) does not preclude federal-court review of an IJ's denial of a motion to reopen).

"specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 8 n.4; Gov't C.A. Supp. Br. 3-8.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 16, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, the government reconsidered its position and concluded that the view of the

majority of the courts is correct. See Gov't C.A. Br. at 7-13, *Alsamhouri, supra.* In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." *Alsamhouri* v. *Gonzales*, 458 F.3d 15, 16, withdrawn on petition for reh'g, 471 F.3d 209, 210 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review [a] denial of a continuance." *Alsamhouri*, 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc," but noting that the "present case is [not] the most appropriate vehicle for doing so").

In its decision in this case, the Seventh Circuit acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. Pet. App. 2a. The opinion further stated that it had "been circulated among all judges of th[at] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 3a n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest that the court may be willing to revisit the question presented en banc. On December 10, 2007, the Seventh Circuit issued an

order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. for Reh'g at 1, *Potdar*, *supra*. On February 11, 2008, the government filed a response, in which it urged en banc rehearing on the issue of its jurisdiction over continuance denials. Resp. to Pet. for Reh'g at 8-13, *Potdar*, *supra* (Response).[5] There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural aspect of the conduct of removal proceedings. The IJ's denial of a motion for a continuance is reviewable by the BIA only for abuse of discretion and

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[5] The government's response, however, did note that there is a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance. The panel in *Potdar* had held that the petitioner's motion to the IJ, which was styled a motion to terminate exclusion proceedings, "amounted to a request for a continuance" because it "requested only an opportunity to pursue [adjustment of status] through appropriate administrative channels." 505 F.3d at 684-685. The government argued in its response to the rehearing petition that the panel erred in deeming the motion to terminate a motion for a continuance, Response at 6-8, but that if the court of appeals declines to revisit that issue, then the court should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 8-13.

requires a showing of substantial prejudice. The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion in denying a motion for a continuance here. See pp. 15-16, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 10-11 & note 4, *supra*, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-Khaliel*, 436 F.3d at 634; *Lim*, 2007 WL 4562133, at *1; *Martinez*, 166 Fed. Appx. at 300. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

First, the claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. Petitioner has conceded removability, Pet. App. 60a, and he has no entitlement to stay in this country illegally. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). As the BIA explained, Pet. App. 20a-23a, the IJ provided sufficient explanation for his decision to deny petitioner's request for a further continuance. The BIA noted that the IJ had stated that petitioner "had ample time to pursue his adjustment application"; that there was no indication that petitioner "would be eligible to adjust his status in the near future" in

light of the denial of his son's naturalization application; and that petitioner "could apply for consular processing abroad" in the event that his son's naturalization application was approved. *Id.* at 21a. Because the IJ gave "a rational explanation" for his refusal to grant a continuance, and because that decision did not constitute an "inexplicabl[e] depart[ure] from established policies, or * * * rest[] on an impermissible basis," no abuse of discretion could be established here. *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 146 (7th Cir. 1993) (quoting *Cordoba-Chaves* v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)).[6]

Second, petitioner is now ineligible to obtain the ultimate relief he seeks—adjustment of status—because he has overstayed his period of voluntary departure. In proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal pursuant to 8 U.S.C. 1229c(b)(1), and the BIA ultimately granted him 60 days, or until September 25, 2006, to depart the United States voluntarily in lieu of removal. Pet. App. 22a-24a, 28a-29a, 72a. The decisions of both the IJ and the BIA specifically warned petitioner of the consequences of failing to comply with his voluntary departure order, including the consequence that he would be ineligible to seek discretionary adjustment of status for a period of ten years. *Id.* at 23a-24a, 28a-29a, 57a. Petitioner posted his voluntary departure bond with the agency, thereby assuming the "privileges and penalties

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[6] Petitioner's son Zeeshan was naturalized on January 15, 2008. That does not, however, change the fact that, at the time of petitioner's motion for a continuance, petitioner had no relief available in the foreseeable future. See Pet. App. 13a ("developments [since the IJ's decision] are beside the point," because "[a]t the time the BIA reviewed the denial of the continuance, the only record evidence concerning Zeeshan's citizenship application indicated that it was denied").

related to * * * voluntary departure." *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50 (B.I.A. 2006).

On September 21, 2006, four days before his voluntary departure period was to expire, petitioner was granted a temporary stay of his voluntary departure period by the Seventh Circuit. See Order, *Ali* v. *Gonzales*, No. 06-3240 (Sept. 21, 2006). However, the court of appeals then denied his requests for a further stay of voluntary departure on October 16, 2006.[7] Petitioner has since failed to depart the United States voluntarily.[8] As a result, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) (providing that "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a) (same); see *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (finding that "Congress provided for certain penalties to attach when an alien overstays his voluntary departure period."). Because petitioner is statutorily ineligible for the underlying relief that he seeks, his case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a continuance. Further review is therefore unwarranted.

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[7] On October 31, 2006, petitioner moved the court of appeals to reconsider its October 16, 2006, order denying his stay requests. See *Ali* v. *Gonzales*, No. 06-3240. The court did not adjudicate that motion prior to its dismissal of petitioner's petition for review.

[8] On January 9, 2008, petitioner applied for an emergency stay of removal before this Court. See *Ali* v. *Mukasey*, No. 07A583. This Court denied petitioner's request on January 15, 2008.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2008

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FILED
MAR 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-798

IN THE

Supreme Court of the United States

SYED IQBAL ALI,

Petitioner,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

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INTRODUCTION

8 U.S.C. § 1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." The issue here is whether this section strips courts of jurisdiction to review the decision of an immigration judge ("IJ") denying a motion for a continuance. There is a clear circuit split on this important and recurring issue of federal immigration law. Pet. at 9-17. Seven circuits (the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh) have held that § 1252(a)(2)(B)(ii) does not deprive the courts of jurisdiction to review continuance decisions. The Eighth and Tenth Circuits, along with the Seventh Circuit below, have held that courts do not have such jurisdiction. Under the majority rule, the Petitioner would have had his case reviewed on the merits by the Seventh Circuit.

The Government does not contest either that the split exists or that the majority of circuits are clearly correct that courts have jurisdiction to review continuance decisions. *See* Opp. at 11 ("[T]he majority position represents the better reading of the statute."). In fact, the Government fully agrees that the court below erred and, before the courts of appeals, now takes the position that this section does not bar review of continuance decisions. Opp. at 11-12.

Nonetheless, the Government inexplicably resists having this Court correct that conceded, profound error. Instead, it argues that review is not warranted

for three reasons that bear little relation to this pure question of federal court jurisdiction.

The Government first contends that the 7-3 split will somehow cure itself, because the Government has now reversed its position. But, as this very case illustrates, the circuit courts have *not* always followed the Government's lead on this jurisdictional issue, and the Government offers no other support for the counter-intuitive notion that three circuits will voluntarily overturn their own precedent.

The Government next suggests that erroneously denying aliens judicial review is of no import because it will rarely affect the outcome of removal proceedings. But a correct jurisdictional rule is important for its own sake and, in any event, the circuits that follow the majority view do hold that IJs have abused their discretion in denying continuances. This is especially true when, as here, the alien requests a continuance solely because of the Government's own delay in processing an application or petition that will determine whether the alien is eligible for adjustment of status.

Finally, the Government attempts to muddy the fact that this case is an ideal vehicle to resolve the circuit split on the *jurisdictional* question by prematurely focusing on the *merits* of Petitioner's case. But the fact-bound issue of whether the IJ properly or improperly denied a continuance has nothing to do with the antecedent question, presented here, of whether courts may review such denials. Thus, predictions as to how the Seventh Circuit will resolve the merits issue on remand should have no bearing on whether the Court

resolves the split on the jurisdictional issue dividing lower courts.

In any event, on remand, Petitioner will have a strong argument on the merits because the only reason Petitioner did not have an immigrant visa when he appeared before the IJ was the Government's own delay in processing the naturalization application of Petitioner's son. In precisely these circumstances, numerous cases have held that an IJ abused its discretion in denying a continuance. Moreover, the Seventh Circuit's potential grant of Petitioner's petition for review would, under Seventh Circuit law, remove the voluntary departure bar that the Government asserts prohibits Petitioner from seeking adjustment of status.

I. ONLY THIS COURT CAN RESOLVE THE DEEP SPLIT AMONG THE COURTS OF APPEALS ON WHETHER COURTS HAVE JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A MOTION FOR A CONTINUANCE

The Government's argument that the 7-3 split "may well resolve itself," Opp. at 12, is unrealistic and unnecessarily prolongs uncertainty and disuniformity on this issue throughout the country.

The Government contends that uniformity can be achieved without this Court's intervention because the Government no longer argues that § 1252(a)(2)(B)(ii) precludes review of continuance decisions. Opp. at 12-13. The proceedings below, however, illustrate that the Government's argument is unrealistic. *Notwithstanding* the Government's

agreement with Petitioner on jurisdiction, the Seventh Circuit held that it did *not* have jurisdiction to review the IJ's continuance denial. Pet. App. 10a. Thus, because the courts of appeals are always obligated to ensure that they have jurisdiction, and because the courts of appeals are free to disagree with the Government's current reading of § 1252(a)(2)(B)(ii), there is no reason to think that the Government's change of position will cure the deep split in the courts of appeals.

Moreover, the actual experience in the minority circuits does not, contrary to the Government's contention, Opp. at 13, suggest that future *en banc* review will lead to reversal of the circuit precedent creating the split. The Government first argues that the Seventh Circuit, "may be willing to revisit the question presented *en banc*" because the Government's response to a petition for rehearing *en banc* in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007), purportedly "urged *en banc* rehearing on the issue of . . . jurisdiction over continuance denials." Opp. at 13-14. In fact, the Government argued that the *Potdar* case did not even fairly *present* the issue whether *continuance* denials are reviewable, because that case did not involve such a denial, but was rather a case where the alien made a motion to *terminate* immigration proceedings. *See* Respondent's Answer with Suggestion for Rehearing En Banc at 7, *Potdar v. Mukasey*, No. 06-2441 (7th Cir., filed Feb. 11, 2008) ("Continuing a proceeding and terminating a proceeding are two different procedural concepts."); *see also* Opp. at 14 n.6. Thus, the Government asked the *panel* to correct its mistake by treating the motion at issue as one to

terminate and to then *deny* the appeal because the refusal to terminate was proper. *See* Answer at 7 ("Although neither the IJ nor the Board addressed Potdar's termination request during his reopened proceedings, the only result of addressing it would have been a denial as DHS was on record as opposing the motion."). *En banc* review will be *denied* if the Government's suggestion is followed and, in all events, will likely be denied because the *Potdar* case is an extremely poor vehicle for resolving whether review is available for continuance denials, since it at least arguably does not present the issue. In any event, the Seventh Circuit has otherwise shown no inclination to grant *en banc* review on this issue. For example, it denied *en banc* review in this case, with only four dissents, Pet. App. 3a n.1, *after* the Government switched positions. Indeed, on February 14, 2008, the Seventh Circuit issued another opinion holding that it did not have jurisdiction to review the denial of a continuance. *See Wood v. Mukasey*, --- F.3d ---, 2008 WL 383286, at *3 (7th Cir. 2008); *see also Gulati v. Mukasey*, No. 06-3221, 2007 WL 2988632 (7th Cir. 2007), *reh'g and reh'g en banc denied* (Dec. 27, 2007).

As to the Eighth Circuit, the Government can point only to a footnote in a panel opinion in *Ikenokwalu-White v. Gonzales*, 495 F.3d 919 (8th Cir. 2007), suggesting that "it may be appropriate for our court to revisit this issue *en banc*," *id.* at 924 n.7, to support its claim that the Eighth Circuit "may well reconsider" its minority position, Opp. at 13. Yet, the Eighth Circuit has taken no steps towards reconsidering *en banc* the question presented, and has continued to apply *Onyinkwa* without hesitation.

See, e.g., *Thiam v. Gonzales*, 496 F.3d 912, 915 (8th Cir. 2007).

Finally, the government does not even *suggest* that the Tenth Circuit *might* reconsider, since it continues to faithfully apply *Yerkovich* without any hint that it is susceptible to alteration. *See, e.g.*, *Kechkar v. Gonzales*, 500 F.3d 1080, 1083 (10th Cir. 2007); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007). By itself, the Tenth Circuit would maintain the split, and so its undisputed contrary position on jurisdiction, standing alone, warrants the Court's review of this issue here.

In short, even though the Government has changed its litigating position, the courts adhering to the minority position continue to apply the jurisdictional bar, and will continue to do so until this Court resolves the question presented.

II. THE JURISDICTIONAL QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE AND IS OUTCOME-DETERMINATIVE IN IMMIGRATION PROCEEDINGS

The question presented by this case is an important issue of federal court jurisdiction that determines whether an alien has access to a court for review of his immigration proceeding, or is instead deported without any judicial review of the Government's action. Far from being a "narrow aspect" of removal procedure, Opp. at 14, judicial review over continuance decisions is highly important because, as the Petition explains and the Government does not dispute, a continuance decision

almost always determines the final outcome of an alien's removal proceeding. Pet. at 21-23.

Nor is there anything to the Government's nihilistic argument that judicial review is virtually meaningless since the Government usually wins. Opp. at 14-15. To be sure, the power to decide a continuance is within the sound discretion of the IJ, so it will typically be upheld, like all decisions adjudicated under an abuse of discretion standard. *See* 8 C.F.R. §§ 1003.29, 1240.6. But this hardly suggests that such review is *unimportant*. Rather, it serves the essential function of eliminating (and deterring) *abuses* of discretion.

For example, in *Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007), a case discussed in the Petition, Pet. at 23, the Sixth Circuit reversed the IJ's decision denying a continuance, pointing out that, except for lacking the translation of a foreign divorce document he sought a continuance to obtain, Badwan would have easily established eligibility for adjustment of status. *Badwan*, 494 F.3d at 569. More typically, numerous cases have found continuance denials improper where the alien sought the continuance because of bureaucratic delay within the Government itself. *See, e.g., Merchant v. U.S. Attorney General*, 461 F.3d 1375, 1379 (11th Cir. 2006) (continuance denial overturned where petitioner awaited adjudication of his employment-based visa application and application for adjustment of status by DHS); *Haswanee v. U.S. Attorney General*, 471 F.3d 1212, 1217 (11th Cir. 2006) (per curiam) (finding an abuse of discretion when the petitioner was waiting for the INS to act on his employment-based visa application); *Bull v. INS*, 790 F.2d 869, 869 (11th

Cir. 1986) (per curiam) (finding an IJ abused its discretion when the petitioner's wife "was merely awaiting government approval of" an immediate relative visa); *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006) (noting that "Thapa's labor certification was entirely out of his hands at the time of the hearing; there was nothing he could do to move the process along").

These cases demonstrate that meaningful review is needed to ensure that IJs exercise their discretion in a way that does not arbitrarily deny aliens their statutory right to seek adjustment of status. This is, of course, precisely why Congress mandated such review.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE JURISDICTIONAL QUESTION PRESENTED

The only holding challenged here, and upon which the circuits are split, is the *denial* of judicial review. Such denials of review are not excused or affected by whether the required review would come out in petitioner's *favor*—the denial itself is a distinct and palpable injury. And in *every* case this Court might review to resolve this threshold jurisdictional issue, the Court will not reach the *merits*, but simply find jurisdiction and remand for the statutorily required review.

Thus, it is quite obvious that the relative strength of any petitioner's case on the merits is irrelevant to whether it is an appropriate vehicle for resolving whether review is *available*. Accordingly, the Government's extended discussion of Petitioner's merits case here is beside the point, and serves

merely to obfuscate the straightforward question of whether this case is an appropriate vehicle to resolve the split.

In any event, the Government is wrong about the merits of Petitioner's motion for a continuance and adjustment of status application. As discussed in the Petition, the only reason Petitioner sought a continuance before the IJ was government inertia—the Government had not yet acted on the naturalization application of Petitioner's son, Zeeshan, even though Zeeshan's naturalization application had been pending since Petitioner's initial appearance before the IJ in 2003. Pet. at 4. Zeeshan planned to file a family-based visa petition on his father's behalf once the Government processed Zeeshan's naturalization application. Pet. App. 4a, 61a. But the Government continued to drag its feet and, by the time of Petitioner's final hearing before the IJ in 2005, it had still not acted on Zeeshan's naturalization application. Pet. at 4-5. The Government took so long to act on Zeeshan's application that he was forced to bring a mandamus proceeding in the district court under 28 U.S.C. § 1361. *See Ali v. Keisler*, No. 07CV6186 (N.D. Ill., filed Nov. 1, 2007). Subsequently, the Government completed Zeeshan's naturalization application and he became a naturalized United States citizen on January 15, 2008. Opp. at 16 n.6. He immediately filed a Petition for Alien Relative, with the required fee and the supporting documents, on behalf of the Petitioner. But for the Government's extraordinary delay in processing Zeeshan's naturalization application, Petitioner would have been eligible to adjust his status during his removal proceedings.

Thus, Petitioner's case is analogous to the cases discussed above in which the petitioner sought a continuance solely to accommodate the Government's delay in processing a document essential to the petitioner's adjustment of status application. In each of those cases, as here, if the Government had timely processed the document in issue, the Petitioner would have been immediately able to receive an immigrant visa, and hence be eligible for adjustment of status.

Apparently recognizing this flaw, the Government also seeks to obscure the review issue by claiming that certiorari is unwarranted because, in the end, Petitioner is not eligible to seek adjustment of status because he has overstayed his period of voluntary departure. *See* Opp. at 16 (citing 8 U.S.C. § 1229c(d)(1)(B)). In fact, Petitioner can ultimately obtain adjustment of status. Moreover, his current additional difficulties in doing so are a direct consequence of the IJ's erroneous continuance denial. Thus, this problem will arise in virtually every case of an alien seeking review of a continuance denial. The Government should not be allowed to exploit a Catch-22, whereby review of erroneous continuance denials is defeated on the grounds that the erroneous denial altered the alien's status, such that obtaining ultimate relief is more complicated.

Here, if this Court grants the Petition and rules in favor of Petitioner on the jurisdictional question, the merits question before the Seventh Circuit on remand will be whether the IJ abused his discretion in denying the request for a continuance. A decision by the Seventh Circuit in Petitioner's favor, which is likely because of the Government's delay in processing Zeeshan's naturalization application,

would result in the case being remanded to the BIA. The BIA would then presumably reopen Petitioner's adjustment of status proceedings. When reopening occurs, the matter is, by operation of law, returned to the IJ for adjudication on the merits. *See Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005); *see also* 8 C.F.R. § 1003.2(i) (stating that if the BIA "directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court"). Under *Orichitch*, this reopening of Petitioner's immigration proceedings would *vacate* the previous order of removal, *vacate* the grant of voluntary departure, and thereby *eliminate* the statutory bar that would otherwise prohibit Petitioner from seeking adjustment of status. *See Orichitch*, 421 F.3d at 598. Thus, Petitioner is currently in no different circumstance than he would be if the voluntary departure bar of 8 U.S.C. § 1229c(d)(1)(B) did not exist. As such, the bar should not impede this Court granting the Petition.

IV. BECAUSE THE GOVERNMENT HAS CONCEDED ERROR, THIS COURT COULD SUMMARILY REVERSE

The parties agree that the Seventh Circuit erred in holding that it lacked jurisdiction to review the IJ's denial of Petitioner's motion for a continuance. Thus, if the Court does not believe that plenary review is appropriate, the Court could summarily reverse the Seventh Circuit's decision. This Court has recognized that summary reversal is appropriate when the lower court's decision is clearly incorrect, *e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam), particularly when a circuit split exists on the

question presented, *e.g.*, *United States v. Watts*, 519 U.S. 148, 149 (1997) (per curiam). Summary reversal is also warranted when the Government confesses error in the court below. *E.g.*, *Penner v. United States*, 399 U.S. 522, 522 (1970) (per curiam). In this case, because there is a clear circuit split, because the Government agrees that the Seventh Circuit joined the incorrect side of the split, and because, as explained in the Petition and the Government's Opposition, the minority view is obviously inconsistent with the plain language of § 1252(a)(2)(B)(ii), Pet. at 25-30; Opp. at 11-12, summary reversal is warranted.

Alternatively, because of the Government's new litigating position, the Court could, at a minimum, grant, vacate, and remand the case for further proceedings. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) (noting that GVR is appropriate "in light of a wide range of developments, including . . . confessions of error or other positions newly taken by the Solicitor General").

CONCLUSION

The petition should be granted or, in the alternative, the case should be summarily reversed and remanded to the Seventh Circuit to consider the merits.

Respectfully submitted,

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March 17, 2008